Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

Vol. 21 NOVEMBER 4, 1987 No. 44

This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

The abstracts, rulings, and notices which are issued weekly by the U.S. Customs Service are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Logistics Management, Printing and Distribution Branch, Washington, D.C. 20229, of any such errors in order that corrections may be made before the bound volumes are published.

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402

U.S. Customs Service

Treasury Decisions

19 CFR Part 12

(T.D. 87-132)

CUSTOMS REGULATIONS AMENDMENT RELATING TO ENFORCEMENT OF PROTECTION OF SEMICONDUCTOR CHIP PRODUCTS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to require that persons seeking exclusion of infringing semiconductor chip products first obtain a court order enjoining, or an order of the U.S. International Trade Commission excluding, the importation of the products. Customs will then enforce the court order or exclusion order. This action is being taken to protect the rights that have been granted to owners of semiconductor chip products under the Semiconductor Chip Protection Act of 1984.

EFFECTIVE DATE: November 20, 1987.

FOR FURTHER INFORMATION CONTACT: Legal Aspects: Samuel Orandle, (202) 566-5765; Operational Aspects: Harrison C. Feese, (202-566-8651).

SUPPLEMENTARY INFORMATION:

Background

Title III of Pub. L. 98-620, cited as the "Semiconductor Chip Protection Act of 1984," added a new chapter 9 to title 17, United States Code (17 U.S.C. 901-914), providing for protection of mask works that are fixed in semiconductor chip products. A mask work is defined as a series of related images, however fixed or encoded, that represent the three-dimensional patterns in the layers of a semiconductor chip. It is fixed in a semiconductor chip product when its embodiment in the product is sufficiently permanent or stable to permit the mask work to be perceived or reproduced from the product for a period of more than transitory duration.

As a condition of the protection extended to mask works under 17 U.S.C. 908(a), protection terminates "if application for registration of a claim of protection in the mask work is not made * * * within 2 years after the date on which the mask work is first commercially exploited." The U.S. Copyright Office has been designated to administer the registration system for mask works.

The owner of a registered mask work has the exclusive right, under 17 U.S.C. 905, to reproduce it and to import and distribute a semiconductor chip product in which the mask work is embodied. In addition, pursuant to 17 U.S.C. 906, the owner of a particular product made by the owner of the mask work may import or distribute or otherwise dispose of or use, but not reproduce, that particular product without the authority of the owner of the mask work. The term of protection for the mask owner is 10 years from the date on which the mask work is registered, or the date on which the mask work is first commercially exploited anywhere in the world, whichever occurs first.

Under 17 U.S.C. 910(c)(1), the Secretary of the Treasury and the U.S. Postal Service are empowered to separately or jointly issue regulations for the protection of the rights of mask work owners with respect to importations. These regulations may require, as a condition for the exclusion of articles from the U.S., that the person seeking exclusion take any one or more of the following actions:

(1) obtain a court order enjoining, or an order of the U.S. International Trade Commission (USITC) under § 337, Tariff Act of 1930 (19 U.S.C. 1337), excluding, importation of the articles;

(2) furnish proof that the mask work involved is protected under 17 U.S.C. 905 and that the importation of the articles would infringe the rights of the mask work owner; and/or

(3) post a surety bond for any injury that may result if the detention or exclusion of the articles proves to be unjustified.

Under options (2) or (3), which involve a Customs determination on its own that an imported mask work is infringing, without the intervention of a court or the USITC, articles which are imported in violation of the rights set forth in 17 U.S.C. 905 are subject to seizure and forfeiture in the same manner as property imported in violation of the customs laws. Any such forfeited article may be destroyed as directed by the Secretary of the Treasury, except that the article may be returned to the country of export whenever it is shown to the satisfaction of the Secretary that the importer had no reasonable grounds for believing that his acts constituted a violation of the law.

The Semiconductor Chip Protection Act (the SCPA) became effective upon its enactment on November 8, 1984. However, 17 U.S.C. 913(a) held the registration and enforcement mechanisms in abeyance for 60 days. These registration mechanisms and enforcement provisions, therefore, went into effect on January 9, 1985.

Customs considered all three of the options for protection of the mask work owner's rights under 17 U.S.C. 905 and decided that options (2) and (3) are not advisable. These options would require that Customs provide mask work protection in a similar manner to the way it protects copyrights. Under either of these options, owners would be required to record their registered mask works with Customs for a prescribed fee and Customs officers would have to interdict imported articles containing semiconductor chip products in order to identify those which infringe a recorded mask work.

Customs determined that this would require an expert knowledge of semiconductor chip technology. Customs has neither the required expertise on the part of its inspectional staff nor the resources or funds to train them for this task. Also, it would be operationally infeasible to disassemble articles in order to extract the suspected infringing chips for testing purposes. Further, the determination of infringement would involve a full adjudicatory review requiring the presentation of evidence and an in-depth analysis of highly technical material. Customs does not have hearing examiners nor a panel of experts to insure an administrative review in less than the 18 months in which the USITC is required to conclude its investigation and make a determination.

Customs believes that the adjudication of semiconductor chip infringement issues is the appropriate domain of the USITC or the courts for several reasons. First, because of its experience with such matters as patents, the USITC has acquired an expertise that is essential to the resolution of complex infringement issues such as those raised by the SCPA. Secondly, in consideration of the novelty and controversial nature of chip infringement cases, and the lack of any guidelines, it is appropriate for the courts or the USITC to decide these cases in order to establish legal precedents, as they now do with respect to patent, trademark, and copyright infringement issues. Once the case is decided, Customs will enforce the court order, or USITC orders. Finally, adjudication of the issue in the courts or the USITC would be preferable to enforcement by Customs because the courts and the USITC can expeditiously and successfully balance the competing interests of the importer and the domestic producer of semiconductor chips.

To implement the SCPA, Customs published a notice in the Federal Register on July 29, 1986 (51 FR 27057), proposing to amend § 12.39, Customs Regulations (19 CFR 12.39), by adding a new paragraph (d) to require that persons seeking exclusion of infringing semiconductor chip products first obtain a court order enjoining, or an order of the USITC under 19 U.S.C. 1337, excluding, importation of the articles. Exclusion orders issued by the USITC are enforceable by Customs under § 12.39(b), Customs Regulations.

The proposal specified that the regulation would be effective against all importers regardless of whether they have knowledge that their importations are in violation of the SCPA. Thus, import-

ers who claimed that they had no knowledge that their importations were violative would not be able to use this claim as a defense against injunctive relief obtained by the mask work owner.

It was noted that the Commissioner of Customs would not be a party to the action in which injunctive relief is being sought from the court. Inasmuch as Customs would enforce any order of the court, it would not be necessary to name the Commissioner as a defendant in the action. The proper parties to be named would be those persons involved in the importation of the alleged violative articles.

Only four comments were received in response to the notice. A discussion of these comments and our responses follow.

Discussion of Comments

Comment:

One commenter proposed that Customs hold the allegedly infringing chip products while the mask work owner litigates the issues in court. Such a procedure would eliminate the necessity of adjudicating complicated legal issues.

Response:

Customs does not agree with this suggestion because we would have to detain articles at the behest of "mask work" owners who allege that they plan to litigate the issue of "mask work" infringement. Presumably the "mask work" owners would agree to post bond (17 U.S.C. 910(c)(1)), though the bond amount on a small initial shipment would be inadequate to serve as a deterrent. Detained articles would remain in Customs custody during the pendency of the litigation. Customs could be in the position of detaining imported goods simply because the owner filed a lawsuit. Given the rapid changes in chip technology, "mask-work" owners could keep non-infringing but competing chip products off the market during their useful life simply by filing a lawsuit and purposefully causing delays in the trial date. Furthermore, the importer may lack the resources to contest the lawsuit. Customs does not have the expertise needed to access accurately the relative merits of "mask work" lawsuits, and would be reduced to detaining articles indiscriminately. In our opinion, Customs should have a court or USITC order before goods are detained.

Comment:

Several commenters believed that the proposal would have a detrimental effect on the ability of mask work owners to protect against the small blatant pirate who disappears as soon as infringing copies enter the stream of commerce. The pirates default on actions filed against them and cannot be located to satisfy any judgments. The only meaningful remedy is stopping distribution upon entry. There is no reason for providing a lower standard of protec-

tion for mask works than is afforded other forms of intellectual property.

Response:

As explained in the notice, we do not believe Customs enforcement is the answer to problems posed by small, fly-by-night "mask work" infringers. Customs cannot indiscriminately detain the myriad of products which contain semiconductor chips based on allegations that the chips infringe protected "mask works." By the time Customs makes an informed decision on whether the imported article complained of is actually infringing, the "mask work" owner could obtain a preliminary injunction from the court or a temporary exclusion order from the USITC. Both of these forums are more expert and capable of taking proper action than Customs. Customs would, of course, honor such orders and detain goods.

Comment:

One commenter agreed with Customs that much litigation under the SCPA will be highly technical and time consuming. In these cases, it may be impractical for Customs to retain custody of the allegedly infringing products while the case is litigated. The commenter believes, however, that some cases will involve uncontested instances of piracy and the uncontested nature of the case can be determined within 20 days from the filing of a complaint. The commenter understands Customs has discretion under the statute not to implement all of the conditions enumerated in § 910(c). Moreover, the commenter appreciates that any additional procedures will require expenditure of valuable staff time and that in the present environment of budget reductions, the assumption of additional duties clearly presents difficulties.

Response:

Customs agrees with these comments. In uncontested court cases, a default judgement would issue quickly which would be honored and enforced by Customs.

Comment:

The proposed regulations could potentially deny registered mask work owners the remedies that Congress contemplated in drafting § 910(c)(1). It is important that registered mask owners have access to exclusive remedies on a timely basis. Due to rapidly changing technologies, semiconductors have short life cycles. Under the proposal, the market window for an infringed-upon mask work may become inconsequential by the time a registered mask work owner obtains a court or USITC order. Section 910(c)(1) was enacted to provide Customs with a relatively flexible, inexpensive and timely set of options with which to determine the need for exclusion on a case-by-case basis. Congress did not intend that Customs require court or USITC orders for all exclusion orders.

It was suggested that Customs should consider implementation of a discretionary administrative procedure under which alleged infringing products could be seized if circumstances warrant such action. The discretionary procedure would allow Customs considerable latitude in developing policies to fit the particular administrative situation. The commenters hope that Customs will retain flexibility to determine exclusion on a case-by-case basis.

Response:

Drafting regulations and guidelines for Customs officers for consideration in "mask work" infringement cases, as suggested, is not feasible. In view of the many and varied missions of Customs and the increased demands on the time of Customs officers, the added burden of having Customs officers decide on an case-by-case basis whether to detain articles containing semiconductor chips on suspicion of "mark work" infringement, and how long the goods should remain under detention, is not justified. Customs would be forced to react to pressures from both sides demanding either that the goods be released or seized. Customs cannot promulgate detailed regulations on "mask work" infringement incorporating the suggested factors for consideration and also devote the hours required to train inspectional staff to use them correctly. In the absence of detailed regulations and guidelines, accusations of disparate treatment by Customs at different ports would be rampant. In particular cases, Customs could be accused of being arbitrary and capricious.

Comment:

A commenter stated that technical expertise is not needed for infringement determination in every case. Section 910(c)(1)(B) requires that the mask work owner furnish proof that the mask work is protected under the SPCA and the importations of articles would infringe the protected mask work. No expert knowledge of semiconductor technology would be required of Customs. Nor would an additional allocation of resources by Customs be required to identify infringing semiconductor chips incorporated into consumer articles. The owner of the registered mask work would be expected to identify infringing chips and consumer articles, and assist Customs with technical expertise and relevant data. If Customs was not satisfied that the imports were not infringing, the issue could be referred to court or the USITC.

Response:

Without technical expertise of its own on semiconductor chip technology, Customs would be reduced to accepting, without questing, all evidence submitted by "mask work" owners regarding infringement. Technical expertise by Customs is essential so that we can assess independently the allegations and proof offered by "mask work" owners. Customs experience with copyright and trademark cases is that owners take the position that anything remotely re-

sembling their copyrighted or trademarked item is considered to be infringing. Customs does not believe it advisable to prohibit the entry of articles incorporating semiconductor chips based solely on self-serving allegations of "mask work" owners. A court order or USITC order, in Customs opinion, is an essential precondition to exclusion by Customs. Furthermore, Customs does not believe it should be filing a lawsuit or a complaint with the USITC in questionable cases. The parties to the dispute may not choose to file such actions on their own, preferring to have Customs issue a free administrative decision. Further, if Customs decided some cases, but required the "mask work" owner to produce a court order of USITC exclusion order in others, Customs could be accused of being arbitrary and capricious. Customs would be no more successful than the USITC or the courts in establishing "mask work" infringement on a timely basis. It would not be practical for Customs to detain large shipments of articles containing semiconductor chips, and then extract and test the suspected chips for infringement. Considering the lack of legal precedents or guidelines for determining "mask work" infringement and the lack of technical expertise by Customs, most of these cases will surely be complicated. In contested cases, Customs would need to have hearing officers available to take testimony and other evidence from technical experts in order to reach an informed and impartial decision on its own on the issue of "mask work" infringement. At present, we do not have hearing officers available for this purpose. In our opinion, Customs is not required by the SCPA to acquire the necessary in-depth technical expertise and provide the hearing officers needed to assess testimony and evidence on the issue of "mask work" infringement. The USITC and the courts are in place now and fully competent to handle contested cases more quickly, considering that Customs has no expertise in this area an no quasi-judicial apparatus in place. Congress has provided three options in § 910(c)(1) and has provided that Customs could select *"one or more"* of those options. Customs has selected the option that requires the person seeking exclusion to obtain a court order or USITC order as a precondition.

Comment:

Commenters contend that the owner of the recorded mask work would be expected to come forward with detailed information needed to identify the imported articles which infringe the recorded mask work. Such information could include a set of overlays or photographs of the infringing chip taken from a particular model, the chip number which is marked on the module and/or the logo of the company of manufacture. Customs merely has to identify the model number from the exterior of the article. At most, Customs may wish to disassemble a number of these identified articles to confirm that they contain the identified chip number and logo, which normally are readily visible once the cover of the article is removed. In any

event, the Articles would not have to be disassembled for testing the chip and, with either procedure, such a practice would not be time consuming or operationally infeasible. Customs can also require the importer to furnish proof that the identified chip numbers are not contained in the imported articles. Customs always has the administrative flexibility, including the discretion to request a surety bond or to create a detention period for allegedly infringing chips.

Response:

The commenters assume that those persons who would engage in "mask work" infringement would never change a model number, chip number or logo. Based upon our experience with regard to other enforcement areas, Customs would expect that these are some of the first things such persons would do to eliminate suspicion. Technical expertise would be essential so that Customs could assess chip overlays of protected models and other proofs of infringement offered by "mask work" owners independently, even though the model numbers, chip numbers or logos have changed. Customs disagrees with the comment that substantial disassembly and testing operations would not be required. Storage of articles detained while disassembly operations are underway would present serious problems as would obtaining skilled personnel for disassembly. Stopping commerce in articles alleged to incorporate infringing chips is a drastic first step. A court order of USITC exclusion order, in our opinion, should be required before detention or exclusion by Customs is initiated.

Comment:

A Customs infringement determination requires the posting of a surety bond by the mask owner. To insure that a determination by Customs is not abused by the mask owner due to lack of technical expertise on the part of Customs, a surety bond should be required before a determination could be made. This would be especially important where the alleged infringing chips are contained in expensive electronic articles. With this safeguard and the ability of Customs to refuse a determination in appropriate cases by requiring the mask work owner to obtain a court or USITC order, the mask work owner would have flexibility in enforcing his rights without the possibility of undue harm to the importer or the public.

Response:

The surety bond does not fully compensate the importer for damages incurred by the wrongful detention of articles containing non-infringing chips. This is particularly true during periods when buying of electronics is heavy. Under the current guidelines applicable to imports detained on suspicion of piratical copying, the bond of the copyright owner is in the amount of the entered value of the shipment under detention, plus duties, plus 20 percent of this total.

The inadequacy of the bond amount is apparent in cases where the detention of a small initial shipment by Customs throws a cloud over the importer's ability to deliver a large shipment scheduled to arrive shortly thereafter. The loss of a major customer could put the importer out of business or leave him with uncompensated losses, including legal expenses incurred in fighting the unwarranted detention. Furthermore, the copyright regulations provide a 30-day period for the copyright owner to decide whether or not to post the bond (19 CFR 143.43). If similar "mask work" regulations were promulgated, the "mask work" owner could purposefully wait 29 days, then decide not to post the bond, thereby eliminating competition for a substantial period without incurring any bond obligation. Customs does not believe the filing of a bond provides sufficient surety to override the need for a USITC or court order. Further, Customs would be open to charges of being arbitrary and capricious if we detained articles and allowed the "mask work" owner to post bond in some cases, thereby effectively eliminating competition, and released articles in other cases, requiring a USITC or court order as a prerequisite to Customs enforcement.

Comment:

Section 910(c)(1) provides Customs with a relatively flexible, inexpensive and timely set of options with which to determine the need for exclusion on a case-by-case basis. Congress did not intend that Customs require court or USITC orders for all exclusion orders under § 910(c)(1). It was expected that there would be some situations in which the identification of infringing chips, or products containing infringing chips, would be uncomplicated. In more complicated infringement cases where substantial similarity is an issue and expert testimony will be required, Customs could refuse to make a determination and require the mask work owner to obtain a court or USITC order. By limiting such an order to complicated cases and including § 910(c)(1)(B) as part of the enforcement procedure for simple infringement cases, the mask work owner will be given more flexibility and timely relief against infringers of the protected mask works. Moreover, the burden on Customs is minimal.

Response:

We disagree. Without legal precedent or guidelines, all "mask work" infringement questions are complicated. As stated previously in this document, Customs lacks the expertise essential to make a determination on its own that "mask work" infringement is suspected. Technical expertise by Customs would be essential, so that we can assess chip overlays of protected models and other proofs of infringement offered by "mask work" owners independently. Substantial disassembly and testing operations by Customs would be required. Storage of articles detained while disassembly and testing operations are underway would present serious problems for Customs as would obtaining skilled personnel for disassembly. If Cus-

toms were required to differentiate between complicated cases on the one hand and uncomplicated cases on the other hand, and use a decision that the case is complicated to justify requiring a court or USITC order, Customs will face the impossible task of writing regulations and guidelines for determining what cases are complicated. Without detailed guidelines, Customs could be accused of being arbitrary and capricious in deciding which cases are complicated. Stopping commerce in articles alleged to incorporate infringing chips is a drastic first step. A court order or USITC exclusion order, in our opinion, should be required before action by Customs is initiated.

Comment:

One commenter noted that importation infringements will be few if effective remedies are available. The supplementary information to the proposed regulation recognizes the "large unearned competitive advantage" obtained by the mask work pirate. However, it states that no factual data exists as to the extent of unauthorized importations, and specifically requests information as to the extent of importations alleged to infringe protected mask works embodied in semiconductor chips. Although copying as a standard business practice was established well before the enactment of the SCPA, there have been no reported cases of foreign mask work infringement to date. The reasons for this are many. First of all, the SCPA currently serves as a deterrent to mask works infringement which did not exist before. Secondly, mask works protected by the SCPA can be licensed. Finally, the SCPA is only in its second year of existence. The commenter believes that the proposed regulations would weaken the protection afforded mask works and thereby encourage infringement. The commenter contends that if both the law and regulations pose an effective deterrent, the number of determinations of infringement of mask works by Customs will be few.

Response:

Customs does not agree. In two years, there are no cases of foreign mask work infringement under the SCPA. Nevertheless, Customs is being asked to promulgate lengthy and detailed regulations which would allow registered "mask work" owners to record their works with Customs for import protection. Customs would then be expected to, (1) provide training to Customs officers so that they would have the expertise needed to successfully monitor the whole gamut of electronic articles containing semiconductor chips for chips suspected of "mask work" infringement, (2) detain and store articles containing suspected chips, (3) examine the chips in our laboratories (the chips are consumed in the testing), and (4) provide expert legal review of the laboratory findings so that a correct legal determination on the complex issue of "mask work" infringement can be made with *no* court cases, USITC exclusion orders or other precedents available. In our opinion, Customs cannot become as

heavily involved in enforcement of this issue as the commenter would like. We do not agree that the regulations would weaken the protection afforded "mask work" owners and encourage infringement. Neither do we see how the fact that a "mask work" can be licensed has anything to do with discouraging pirates who do not want to pay for the licenses from violating the SCPA.

After thorough consideration of all the comments and further review of the matter, Customs remains of the opinion that the only viable alternative for protection under the SCPA is for a court order or a USITC order to be obtained as a precondition to exclusion of an article by Customs.

Executive Order 12291

This document does not meet the criteria for a "major rule" as specified in E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

Regulatory Flexibility Act

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that the amendment will not have a significant economic impact on a substantial number of small entities. It will affect only importers of semiconductor chip products and owners of these products who register them. Accordingly, the amendment is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

Drafting Information

The principal authors of this document were Bruce J. Friedman and Samuel Orandle, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

List of Subjects in 19 CFR Part 12

Customs duties and inspection, Imports, Unfair Competition.

Amendments

Part 12, Customs Regulations (19 CFR Part 12), is amended as set forth below.

PART 12—SPECIAL CLASSES OF MERCHANDISE

1. The authority citation for Part 12 continues to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (Gen. Hdnote. 11, Tariff Schedules of the United States), 1624.

§ 12.39 also issued under 19 U.S.C. 1337, 1623; 17 U.S.C. 910;

2. Section 12.39, Customs Regulations, is amended by adding a new paragraph (d) to read as follows:

§ 12.39 Imported articles involving unfair method of competition or practices.

* * * * * * *

(d) *Importations of semiconductor chip products.*

(1) In accordance with the Semiconductor Chip Protection Act of 1984 (17 U.S.C. 901 *et. seq.*), if the owner of a mask work which is registered with the Copyright Office seeks to have Customs deny entry to any imported semiconductor chip products which infringe his rights in such mask work, the owner must obtain a court order enjoining, or an order of the U.S. International Trade Commission (USITC), under § 337, Tariff Act of 1930, as amended (19 U.S.C. 1337), excluding, importation of such products. Exclusion orders issued by the USITC are enforceable by Customs under paragraph (b) of this section. Court orders or exclusion orders issued by the USITC shall be forwarded, for enforcement purposes, to the Director, Entry, Procedures and Penalties Division, U.S. Customs Service, Washington, D.C. 20229.

(2) The district director shall enforce any court order or USITC exclusion order based upon a mask work registration in accordance with the terms of such order. Court orders may require either denial of entry or the seizure of violative semiconductor chip products. Forfeiture proceedings in accordance with Part 162 of this chapter shall be instituted against any such products so seized.

(3) This regulation will be effective against all importers regardless of whether they have knowledge that their importations are in violation of the Semiconductor Chip Protection Act of 1984 (17 U.S.C. 901–904).

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: July 13, 1987.
FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, October 21, 1987 (52 FR 39217)]

(T.D. 87–133)

GUIDELINES FOR DISPOSITION OF VIOLATIONS OF THE TIMELY ENTRY SUMMARY FILING REQUIREMENTS—1987 MODIFICATION

1. Introduction

This decision is issued in accordance with the authority granted the Commissioner in section 172.22(d) of the Customs Regulations

(19 CFR 172.22(d)) concerning publication of guidelines for the cancellation of claims for liquidated damages issued for late filing of entry summaries. The guidelines are amended by raising the basic charge assessed in settlement of these claims from \$50 to \$100. In certain limited instances the charge shall be raised from \$50 to \$200.

2. Background

On May 12, 1983, T.D. 83–117 was published setting forth guidelines governing the cancellation of claims for liquidated damages arising from violations of timely entry summary filing requirements contained in Part 142, Customs Regulations (19 CFR Part 142) as authorized by sections 484(a) and 448(b) of the Tariff Act of 1930, as amended (19 U.S.C. 1484(a) and 1448(b)). T.D. 83–117 retained the quick settlement procedure originally enunciated in T.D. 80–298. That procedure, which offers the violator an option to pay a predetermined amount in settlement of the claim in lieu of petitioning for relief, is not affected by this decision.

The predetermined amount which is currently in use is calculated by taking a base charge (\$50), and adding to it an interest charge based on the number of days the duties were paid late. Most cases are settled without petition. Over the years this basic procedure has proved to be an efficient and fair way of quickly processing these cases.

The original \$50 base fee, announced in T.D. 83–117, was based on a 1976 cost study that found the cost of processing the simplest liquidated damages case to be \$41.50. The most recent calculation conducted in Customs Southwest Region found the cost of processing the simplest case to have risen to \$69.73. Customs is of the view that the base amount charged must be raised in order to cover the rise in case processing costs. Additionally, Customs is of the view that a rise in the base charge will serve as a further disincentive against filing entry summaries and depositing estimated duties late.

3. Action

Through this decision Customs is raising the basic fee charged in cancellation of late filing cases to \$100. Interest will still be charged at the same rate of 36.5 percent, based on the number of days the duties are withheld from Customs.

A problem has also arisen regarding cases involving a complete failure to file an entry summary and deposit estimated duties. Under the provisions of section 113.62(a) of the Regulations (19 CFR 113.62(a)), the bond principal and surety agree to deposit all estimated duties within the time prescribed by law or regulation. Section 141.101 of the Regulations (19 CFR 141.101) requires that estimated duties be deposited at the time of filing of the entry or entry summary.

When a nonfile occurs, a notice of claim for the duties is issued to the bond principal and surety. Upon presentation of the duties, a

claim for liquidated damages is initiated for late filing of the entry summary.

Under current Automated Commercial System capabilities in the Fines, Penalties and Forfeitures module, it is possible to identify those cases which arise after a claim for duties for nonfiling of an entry is issued. In these instances, Customs has initiated 2 actions—one for the collection of the withheld duties and another for the late filing of liquidated damages claim. The $100 base charge is inadequate recompense for the multiple issuance. Accordingly, Customs shall charge a base fee of $200 in all late filing claims that are generated from a nonfiling situation. The interest charge in these cases will be calculated as it would be in any late file case.

It should be noted that the $200 base mitigation will only occur in cases where a separate claim for the duties is issued. In other nonfile situations which result in entry summary rejection (e.g., failure to attach a duty check to the entry summary or dishonor of duty check by the bank) but are corrected without a notice of claim for the duties having been issued, the $100 base charge will remain in effect.

4. Effective Date

The change in the base fee in late file claims will rise to $100 or $200, where appropriate, for violations occurring on or subsequent to the 30th day after approval of this document.

5. Superseded Material

Treasury Decision 83–117 is hereby superseded insofar as it provides for a base cancellation charge of $50 in late filing of entry summary cases. Other procedures stated therein remain in full force and effect.

Dated: October 14, 1987.

GERALD J. MCMANUS,
Assistant Commissioner,
Commercial Operations.

(T.D. 87-134)

BONDS

Approval to use authorized facsimile signatures and seals

The use of facsimile signatures and facsimile seals on Customs bonds by the following corporate sureties has been approved effective October 14, 1987.

American Home Assurance Company, New York, NY

Authorized facsimile signature on file for:

John J. Sheppard
James M. Gorman
John K. Daily
Bruce S. Haskell
Lee V. Barther

National Union Fire Insurance Company of Pittsburgh, PA, New York, NY

Authorized facsimile signatures on file for:

John J. Sheppard
James M. Gorman
John K. Daily
Bruce S. Haskell
Lee V. Barther

The Customs Service has been provided with a copy of each signature that is to be used, a copy of the corporate seal, and a certified copy of the corporate resolution agreeing to be bound by the facsimile signatures and seals. This approval is without prejudice to the sureties rights to affix signatures and seals manually.

Dated: October 14, 1987
219816

Edward B. Gable, Jr,
Director, Carriers, Drawback, and Bonds Division.

U.S. Customs Service

General Notice

AUTOMATED SURETY INTERFACE; SIGNIFICANT NEW INFORMATION DISSEMINATION PRODUCT

PURSUANT TO OMB CIRCULAR A–130; SOLICITATION OF COMMENTS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Extension of comment period.

SUMMARY: This notice extends the period of time within which interested members of the public may submit comments concerning a new information dissemination product. The Customs Service, through its Automated Commercial System (ACS), is proposing an Automated Surety Interface. Under this program, Customs will furnish certain information to participating surety companies whose bonds cover Customs entries. This information is to be provided irrespective of any claim by Customs against the surety. For some time, disclosure of this information has been made to interested surety companies on a monthly basis. The ultimate goal of the program is a virtually simultaneous exchange of data between the surety company and Customs. As an interim step, Customs is presently conducting a pilot test under which certain data is being provided to a surety company on a weekly basis. It has been represented to Customs that payment by the sureties on claims for liquidated damages or additional duties will be expedited by eliminating the need for Customs to locate the bond and transmit a copy to the surety.

Customs recognized that some or all of this information may be considered to be confidential business information which is protected from disclosure under exemption (b)(4) of the Freedom of Information Act (FOIA). Accordingly, by notice published in the Federal Register on August 17, 1987 (52 FR 30762), Customs invited public comment on whether the disclosure of this information will cause competitive harm. Comments were to have been received on or before October 16, 1987. Customs has received a request to extend the comment period because additional time is required to prepare reasonably responsive comments. Customs believes the request has merit. Accordingly, the period of time for the submission of comments is being extended 30 days.

DATE: Comments are requested on or before November 16, 1987.

ADDRESS: Comments may be submitted to and inspected at the Regulations Control Branch, U.S. Customs Service, Room 2324, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

All comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), between 9:00 a.m. and 4:30 p.m. on normal business days, at the address above.

FOR FURTHER INFORMATION CONTACT: Legal Aspects: John E. Elkins, Chief, Disclosure Law Branch, (202) 566-8681. Operational Aspects: Jim Childress, Commercial System Division, (202) 343-0778.

Dated: October 15, 1987.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

[Published in the Federal Register, October 20, 1987 (52 FR 38995)]

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 177

SOLICITATION OF PUBLIC COMMENT REGARDING TARIFF CLASSIFICATION OF ANNULAR, CORRUGATED FLEXIBLE METAL HOSE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed interpretive rule; solicitation of comment.

SUMMARY: Customs is reviewing its position regarding the tariff classification of certain imported annular, corrugated flexible metal hose, either plain or covered with a braided metal sleeve. Such hose is now classified under the Tariff Schedule item number for "pipes and tubes and blanks therefor * * * of iron * * * or steel." It is proposed to classify the product in question under the Tariff Schedule item number for "flexible metal hose or tubing, whether covered with wire or other material, and with or without fittings." If reclassified, the hose would be subject to a lower rate of duty and no longer be subject to steel arrangements the U.S. has with a number of countries. Comments with respect to the issues will be considered before any decision is reached.

DATE: Comments (preferably in triplicate) must be received on or before November 23, 1987.

ADDRESS: Comments should be submitted to and may be inspected at the Regulations Control Branch, Room 2324, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Classification and Value Division (202-566-8181).

SUPPLEMENTARY INFORMATION:

Background

Customs is reviewing its position regarding the tariff classification of certain imported annular, corrugated flexible metal hose. The merchandise is made from hot rolled steel strip which is formed and welded into a tube. A stamping machine is then used to form annular corrugations, that is, convolutions that are parallel to

one another. These provide flexibility and elasticity. Merchandise of this type is normally imported in lengths of 80 to 100 feet, on reels, and is used with appropriate end attachments or fittings in the steel, refining, oil/natural gas, and chemical industries to convey liquids such as water, acids, chemicals, asphalt, as well as gases and steam, all under pressure. Such hose is also imported covered with a braided metal sleeve which is said to enhance pressure resistance by increasing strength and elasticity.

The described metal hose, either plain or covered with a sleeve, is currently classified in item 610.52, Tariff Schedules of the United States (19 U.S.C. 1202; TSUS) as "pipes and tubes and blanks therefor * * * of iron * * * or steel." This classification carries a column 1 rate of duty of 7.5% ad valorem, plus the additional duties on the alloy content. Also, if from Italy, France, Japan, or the United Kingdom, such metal hose is subject to Voluntary Restraint Agreements (VRA's) the U.S. has with those countries. VRA's are steel arrangements negotiated between the U.S. Trade Representative and other countries which dictate that basic steel products from those other countries cannot be entered into the U.S. for consumption unless accompanied by a valid export certificate. The suggested tariff classification is in item 652.09, TSUS, as "flexible metal hose or tubing, whether covered with wire or other material, and with or without fittings." This classification carries a column 1 rate of duty of 5.8% ad valorem and is not subject to the above mentioned VRA's.

In previously classifying hose as described above, great weight was placed on the 1929 *Summaries of Tariff Information* as a source of legislative history of the flexible metal hose provision. Compiled by the U.S. Tariff Commission for use by legislators preparing to enact the Tariff Act of 1930, it was noted therein, "Flexible metal tubing is made from a continuous metal strip spirally wound and formed in a single or double groove. The edges of the strip are turned in so as to make an interlocked joint * * * The flexibility is given by the elasticity of the metal and not by the sliding of one part over another. Flexible metal tubing may be of the full, square, or semi-interlocked type * * * armored or lined * * * with welded seam or seamless." Customs has traditionally used this authority to limit the provision for flexible metal hose to such hose of interlocked construction.

Customs now believes that a more careful reading of the 1929 *Summaries* reveals ambiguities which make it unreliable evidence of Congressional intent. For example, one of the stated uses of interlocked hose or tubing, to convey acids, is not believed appropriate to this type of product, but rather, to the leak-proof annular or helical type. Moreover, the reference to a product with a welded seam does not appear descriptive of the interlocked type. Customs concludes from these inconsistencies that other types of flexible metal hose or

tubing may have been intended to be covered by the flexible metal hose provision.

Item 652.09, TSUS, the flexible metal hose provision, is an *eo nomine* provision which, in the absence of a contrary legislative intent, covers all forms of the named article. Lexicographic sources define pipes and tubes by reference to one another, and hose to include flexible tube (*Webster's New Collegiate Dictionary*) or flexible pipe (*Webster's New International Dictionary,* 2nd ed., unabridged) used to convey fluids. Customs is satisfied that annular, corrugated flexible metal hose is within the *eo nomine* provision of item 652.09, TSUS. It is proposed to classify future importations of that product under that provision.

In order to properly consider this issue, Customs is requesting the views of the public on the proposed classification of annular, corrugated flexible metal hose in item 652.09, TSUS, as opposed to classification in item 610.52, TSUS. If, after reviewing the comments received in response to this notice, Customs decides to adopt this change in position, an effective date for the change must be determined. In determining this date, consideration will be given to any written comments regarding an appropriate time frame in which the change in position should occur and why such a time frame is recommended.

COMMENTS

Before making any determinations on this matter, Customs will consider any written comments timely submitted. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), between 9:00 a.m. and 4:30 p.m. on normal business days, at the Regulations Control Branch, Room 2324, U.S. Customs Service Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

DRAFTING INFORMATION

The principal author of this document was John Doyle, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

MICHAEL H. LANE,
Acting Commissioner of Customs.

Approved: September 23, 1987.

FRANCIS D. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, October 23, 1987 (52 FR 39662)]

U.S. Court of Appeals for the Federal Circuit

(Appeal No. 87–1014)

AMERITRADE CORP. PLAINTIFF-APPELLANT *v.* HARRY W. CARNES, EDWARD F. KWAS AND THE UNITED STATES OF AMERICA, DEFENDANTS-APPELLEES

Herbert P. Larsen, of New York, New York, argued for plaintiff-appellant. Also on the brief was *Mark S. Gallegos,* of Miami, Florida, of counsel.

Michael P. Maxwell, Commercial Litigation Branch, Department of Justice, of New York, New York, argued for defendants-appellees. With him on the brief were *Richard K. Willard,* Assistant Attorney General, *David M. Cohen,* Director and *Joseph I. Liebman,* Attorney in Charge International Trade Field Office.

Appealed from: U.S. Court of International Trade.
Judge CARMAN.

(Decided October 1, 1987; Unpublished opinion issued October 1, 1987; Published opinion issued October 20, 1987)

Before DAVIS, NEWMAN and ARCHER, *Circuit Judges.*

ARCHER, *Circuit Judge.*

DECISION

The judgment of the Court of International Trade in *Ameritrade Corp.* v. *Carnes,* 637 F. Supp. 1213 (CIT 1986), sustaining the United States Customs Service's (Customs Service) decision to revoke Ameritrade Corporation's (Ameritrade) bonded warehouse license is affirmed.*

OPINION

The Customs Service revoked Ameritrade's bonded warehouse license after finding that it had violated 19 C.F.R. §§ 19.6 (b)(1) and 19.3(e)(2) (1985) by "selling approximately 2,900 cases of bonded liquor to an unbonded warehouse * * *" which subsequently resold the liquor in the United States without payment of duties. The Customs Service also determined that Ameritrade had filed false or fraudu-

*Ameritrade's appeal herein of the orders of the Court of International Trade denying a preliminary injunction and refusing to certify the denial of injunctive relief for interlocutory appeal are moot in view of the decision on the merits.

lent Customs Service forms "knowing these documents to be false, or with reckless disregard for their truth and accuracy."

Before the Court of International Trade, Ameritrade contended primarily that the decision of the Customs Service was unsupported by substantial evidence. The court determined, however, that "[t]he clear evidence presented at the hearing was that [Ameritrade's] president signed 329 false withdrawal documents and that almost 2,900 cases of bonded liquor were sold by [Ameritrade] to an unbonded warehouse and from there sold into United States commerce without payment of duties." It noted that there was unrefuted evidence that Ameritrade's employees had prepared withdrawal documents showing that the liquor was to be delivered by Ameritrade's bonded cartman to another bonded cartman and subsequently to an exporting carrier, whereas Ameritrade's cartman instead sold the liquor to America First Import & Export Corporation, an unbonded warehouse. Ameritrade's procedural arguments were also rejected by the court.

On appeal, Ameritrade, while conceding that the diversion of liquor occurred, argues that there was no evidence of Ameritrade's "complicity" in a diversion scheme with the president of the unbonded warehouse selling the diverted liquor. As a bonded warehouse, Ameritrade had full responsibility to ensure that its merchandise was disposed of in accordance with applicable Customs regulations. *See* 19 C.F.R. § 19.6(b)(1) (1985):

> In the case of merchandise to be carted or transported in bond from the warehouse, the proprietor will be relieved of responsibility only if it receives the signed receipt on the withdrawal or removal document of the carrier named in the document.

It failed to do this when it falsified the withdrawal documents and permitted the bonded liquor from its warehouse to be delivered to an unbonded warehouse. Section 19.3(e)(2) provides for the revocation or suspension of a bonded warehouse license if

> [t]he warehouse proprietor refuses or neglects to obey any proper order of a Customs officer or any Customs order, rule, or regulation relative to the operation or administration of a bonded warehouse * * *.

19 C.F.R. § 19.3(e)(2) (1985).

Although the Customs Service regulation does not hold warehouse proprietors strictly liable for any violations that may occur, there is an expectation of reasonable care in operating under a bonded warehouse license. The record before us supports a finding that Ameritrade conducted its business with respect to the diverted liquor "with reckless disregard" of the Customs regulations. Both the Customs Service and the Court of International Trade determined that there was sufficient evidence to support the conclusion that Ameritrade was aware of the diversion. We find no basis for

overturning this conclusion and therefore affirm the judgment of the Court of International Trade.

AFFIRMED

(Appeal No. 87-1134)

UST, INC. AND TSUBAKIMOTO CHAIN CO., PLAINTIFFS-APPELLANTS *v.* UNITED STATES, MALCOLM BALDRIDGE, SECRETARY OF COMMERCE; BRUCE S. SMART, JR., UNDERSECRETARY OF COMMERCE FOR INTERNATIONAL TRADE; PAUL FREEDENBERG, ACTING ASSISTANT SECRETARY OF COMMERCE FOR TRADE ADMINISTRATION; GILBERT L. KAPLAN, DEPUTY ASSISTANT SECRETARY FOR IMPORT ADMINISTRATION; LEONARD M. SHAMBON, DIRECTOR, OFFICE OF COMPLIANCE, DEFENDANTS-APPELLEES

Robert E. Burke, of Barnes, Richardson & Colburn, Chicago, Illinois, argued for appellant. Of counsel were *David A. Riggle* and *David J. Craven,* of Barnes, Richardson & Colburn, Chicago, Illinois.

Velta A. Melnbrencis, Assistant Director, Commercial Litigation Branch, Department of Justice, Washington, D.C., argued for appellee United States. With her on the brief were *Richard K. Willard,* Assistant Attorney General, and *David M. Cohen,* Director. Of counsel were *Douglas A. Riggs,* General Counsel, *M. Jean Anderson,* Chief Counsel for International Trade, and *John D. McInerney,* Attorney-Advisor, U.S. Department of Commerce.

Douglas E. Phillips, of Covington & Burling, Washington, D.C., argued for appellee American Chain Association. Of counsel was *David E. McGiffert.*

Appealed from: United States Court of International Trade.
Judge CARMAN.

(Decided October 15, 1987)

Before FRIEDMAN, NEWMAN, and ARCHER, *Circuit Judges.*

FRIEDMAN, *Circuit Judge.*

This is an appeal from the portion of an order of the Court of International Trade that denied a preliminary injunction barring the Department of Commerce from requiring the appellant to answer questionnaires the Department had issued to them in connection with its administrative review of an antidumping order. We affirm.

I

In April 1973, the Secretary of the Treasury published T.D. 73-100, a "Dumping Finding" that non-bicycle roller chain (roller chain) "from Japan is being, or is likely to be, sold at less than fair value within the meaning of section 201(a) of the Antidumping Act, 1921, as amended [then 19 U.S.C. § 160(a), now § 1673]." The effect

of this finding was to subject the "dumped merchandise" to antidumping duties. 19 U.S.C. § 1673 (Supp. II 1984).

The administration of the Antidumping Act was transferred to the Department of Commerce (Commerce) in 1979. *See* Exec. Order No. 12,175, 3 C.F.R. § 463 (1980). Under 19 U.S.C. § 1675(a) (Supp. II 1984), Commerce is required to review at least annually the basis and amount of duty to be assessed under an antidumping duty order, and to publish the results of each such review in the Federal Register. The Antidumping Act provides that, after such a review, Commerce "may revoke" the antidumping duty order. 19 U.S.C. § 1675(c) (Supp. II 1984). Commerce's regulations authorize revocation

> [w]henever the Secretary determines that sales of merchandise subject to an Antidumping Finding or Order * * * are no longer being made at less than fair value * * * and is satisfied that there is no likelihood of resumption of sales at less than fair value * * *. Ordinarily, consideration of such revocation * * * will be made only subsequent to [an administrative] review.

19 C.F.R. § 353.54(a) (1981–86) (Commerce's § 353.54 is substantively identical to the Treasury regulation that it replaced, § 153.44 (1980)).

Prior to revoking an antidumping order, Commerce publishes a "Notice of Tentative Determination to Revoke or Terminate." 19 C.F.R. § 353.54(e) (1981–86). "As soon as possible after publication," 19 C.F.R. § 353.54(f), but after opportunity has been provided "for interested parties to present views with respect to the tentative revocation," 19 C.F.R. § 353.54(e),

> the Secretary will determine whether final revocation * * * is warranted. In cases where an application for a revocation * * * is based on the absence of sales at less than fair value with respect to the imported merchandise and the dispositive date for establishing a two-year period of no sales at less than fair value is the date of publication of the Finding or Order, the Secretary may determine that a final revocation * * * is warranted only if the firm involved provides information showing no sales at less than fair value with respect to the subject merchandise up to the date of publication of the "Notice of Tentative Determination to Revoke or Terminate."

19 C.F.R. § 353.54(f) (1981–86) (typographical errors corrected).

The appellant Tsubakimoto Chain Company (Tsubakimoto) manufactures roller chain in Japan, and the appellant UST, Inc. imports roller chain manufactured by Tsubakimoto. Tsubakimoto was one of the companies that T.D. 73–100 found to have engaged in dumping.

Following its administrative reviews for the period April 1, 1979, to March 31, 1981, Commerce published on September 1, 1983, its tentative determination to revoke T.D. 73–100 with respect to Tsubakimoto. 48 Fed. Reg. 39,673 (1983). Commerce also stated that prior to issuing a final revocation determination, it would conduct

further administrative reviews and that if the tentative determination were made final, it would cover all exports made on or after September 1, 1983. *Id.* at 39,674.

Subsequently Commerce initiated administrative reviews for the period April 1, 1981 to August 31, 1983, and for subsequent periods.

The appellants filed their complaint in the present case in August 1986. They sought a writ of mandamus compelling Commerce to complete administrative review and to publish a final determination regarding dumping up to the date of the tentative determination to revoke, and other relief not here pertinent. They also sought a preliminary injunction to bar Commerce from requiring them to answer questionnaires Commerce had issued covering their activities subsequent to the date of the tentative revocation.

On October 10, 1986, the Court of International Trade denied a preliminary injunction. *UST, Inc.* v. *United States,* 648 F. Supp. 1 (1986). The court first held that it had jurisdiction to entertain the suit. The court then stated that the appellants contended that they would suffer irreparable injury if an injunction was denied because "[p]reparing the questionnaires will require massive amounts of time and other resources. No procedure exists for recovering these costs. If the tentative revocation can be made final before the questionnaire is completed plaintiffs argue, these costs can be avoided." 648 F. Supp. at 4. The court held that this claim

> does not satisfy prevailing tests for immediate and irreparable harm. No showing has been made that the data is unavailable or unnecessarily burdensome to procure. Plaintiffs should have ready access to data for the periods in question. It is not enough to show merely plaintiffs may incur costs to complete the required questionnaire * * *. Expending resources for this purpose, moreover, is a slight burden in light of the requirement and public need for current data. [Citation omitted.]

648 F. Supp. at 5.

The court continued the case until the government had supplied various reports concerning completion of its administrative reviews of different time periods and stated that "the Court will not decide at this point whether or not to issue a writ of mandamus." 648 F. Supp. at 6.

II

The government contends that the Court of International Trade had no jurisdiction over this suit because 28 U.S.C. § 1581(i) (1982), pursuant to which the appellants invoked the court's jurisdiction, permits judicial review of Commerce's actions under the antidumping laws only when those actions were final, and does not permit review of the interim actions or failures to act that the appellants here challenge. As noted, the Court of International Trade rejected that contention and held that it had jurisdiction. The government asserts that jurisdictional ruling was erroneous and asks us to va-

cate the Court of International Trade's order of October 10, 1986 "in its entirety" and to remand the case to that court "with directions to dismiss the action filed by appellants for lack of jurisdiction."

The government, however, has not appealed from the portions of the October 10, 1986 order that deal with aspects of the case other than the denial of a preliminary injunction. The government, therefore, cannot seek reversal of those portions of the order. *See United States* v. *American Ry. Express,* 265 U.S. 425, 435 (1924); *Radio Steel & Mfg. Co.* v. *MTD Prods., Inc.,* 731 F.2d 840, 844 (Fed. Cir. 1983), *cert. denied,* 469 U.S. 831 (1984). The government cannot urge its jurisdictional point as an alternative ground for affirmance of the portion of the order that denied a preliminary injunction, since what it seeks through its jurisdictional argument is a vacation of the entire order, including the denial of the preliminary injunction, and a remand to the Court of International Trade with instructions to dismiss the suit for lack of jurisdiction.

Traditionally, jurisdictional questions are said to be open at any stage of the litigation, whether or not the parties have raised them. *DuBost* v. *U.S. Patent and Trademark Office,* 777 F.2d 1561, 1564 (Fed. Cir. 1985); *Yarway Corp.* v. *Eur-Control USA, Inc.,* 775 F.2d 268, 273 (Fed. Cir. 1985). It does not necessarily follow, however, that in the particular circumstances here we should consider the jurisdictional issue, and we decline to do so. The government has informed us that "nearly identical jurisdictional arguments" are presented in the consolidated appeals in *Sharp Corp., et al.* v. *United States, et al.,* Appeal Nos. 87-1087 and 87-1252, and in *Toshiba Corp. et al.* v. *United States, et al.,* Appeal Nos. 87-1087 and 87-1253, in which the government is the appellant. We leave it to the court to deal with the issues in those cases. Nothing we say here is intended to indicate any views upon either the merits of the jurisdictional issues or the appropriateness of the court considering them in those cases.

III

On the merits, this case is controlled by our recent decision in *Matsushita Elec. Indus. Co.* v. *United States,* 823 F.2d 505 (Fed. Cir. 1987). There the Court of International Trade, speaking through a different judge, granted a preliminary injunction similar to that the appellants sought here. The court found that the company subject to the dumping order would suffer irreparable injury if it were required to answer Commerce's questionnaires with respect to its actions subsequent to the tentative determination to revoke the dumping order with respect to that company.

This court reversed the preliminary injunction, holding that the finding of irreparable injury was clearly erroneous. We stated:

> The expenses and effort involved in the defense of litigation do not constitute "irreparable injury" that may justify a pre-

> liminary injunction. *See FTC* v. *Standard Oil Co. of Cal.,* 449 U.S. 232, 244 (1980); *Renegotiation Bd.* v. *Bannercraft Co.,* 415 U.S. 1, 24 (1974). Similarly, "the ordinary consequences of antidumping duty procedures do not constitute irreparable harm." *Toshiba Corp.* v. *United States,* 657 F. Supp. 534, 535 (CIT 1987); *see also UST, Inc.* v. *United States,* 21 Cust. B. & Dec. No. 12, p. 38, 42 (CIT 1987); *UST, Inc.* v. *United States,* 648 F. Supp. 1, 5 (CIT 1986); *Nissan Motor Corp in U.S.A.* v. *United States,* 21 Cust. B. & Dec. No. 4, p. 32, 37 (CIT 1986); *Hyundai Pipe Co.* v. *United States Int'l Trade Comm'n,* 650 F. Supp. 174, 176–77 (CIT 1986).
>
> The Court of International Trade did not find anything unique about the "effort in both human and other resources" that Matsushita would have to "expend" to comply with Commerce's seemingly routine requests. *Cf. Toshiba,* 657 F. Supp. at 535. As the court noted in *Hyundai,* "Commerce issues questionnaires in every case where a party requests administrative review under [19 U.S.C. § 1675]." 650 F. Supp. at 176.

Matsushita, 823 F.2d at 509.

That holding is fully applicable to the present case and requires affirmance of the Court of International Trade's denial of a preliminary injunction because the appellants failed to show irreparable injury. *Matsushita* cannot be distinguished, as the appellants attempted to do at oral argument, on the ground that in this case, unlike *Matsushita,* Commerce already had completed its administrative review of the period up to the date of the tentative revocation determination when the Court of International Trade decided the case. That difference is irrelevant to the Court of International Trade's determination, which *Matsushita* compels us to affirm, that the appellants had not shown the irreparable injury necessary to justify a preliminary injunction.

IV

Although we affirm the denial of the preliminary injunction, we are concerned about Commerce's lengthy and seemingly unwarranted delay in completing administrative reviews of antidumping orders. The failure promptly to determine whether to make final a tentative decision to revoke is particularly troublesome. The companies subject to antidumping ordes from which they seek relief understandably are frustrated and angry when they seem unable to obtain an expeditious decision on their claim. The result is that they are impelled to seek judicial assistance, thereby producing additional litigation that would be unnecessary if Commerce moved with proper dispatch.

The delay by Commerce appears attributable in part to a misunderstanding of our decision in *Freeport Minerals Co.* v. *United States,* 776 F.2d 1029 (Fed. Cir. 1985). As we pointed out in *Matsushita,* we held in *Freeport Minerals* only that the data upon which Commerce relied in determining whether to make final a tentative

determination to revoke "must be current 'up to the date of publication of the "Notice of Tentative Determination to Revoke or Terminate." ' " 823 F.2d at 507. We did not hold, however, that the data must be current up to the date of the final determination. Indeed, in view of Commerce's extensive reviews of periods subsequent to tentative determinations and the time-consuming nature of such reviews, a requirement that the data be current to the date of the final revocation determination frequently would make it impossible ever to render a final determination on revocation.

We are not suggesting, however, that Commerce may never consider data concerning events after publication of the tentative decision to revoke. The Commerce regulation authorizes the revocation of an antidumping duty order only if "the Secretary determines that sales of merchandise subject to an Antidumping Finding or Order * * * are no longer being made at less than fair value * * * and is satisfied that there is no likelihood of resumption of sales at less than fair value * * *." 19 C.F.R. § 353.54(a) (1981–86). We cannot say that in order to determine whether "there is no likelihood of resumption of sales at less than fair value," the Secretary may not consider events after the date of the tentative revocation decision. The extent to which such post-tentative revocation decision data are required is a matter largely within the Secretary's discretion, and the answer depends upon all the facts of the particular case.

CONCLUSION

The portion of the order of the Court of International Trade that denied a preliminary injunction is

AFFIRMED

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas

Senior Judges

Morgan Ford

Frederick Landis

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 87–108)

UNITED STATES, PLAINTIFF *v.* F.H. FENDERSON, INC., DEFENDANT

Court No. 84–07–01008

Before CARMAN, *Judge.*

[Defendant's motion for attorneys' fees and expenses denied.]

(Decided September 25, 1987)

Richard K. Willard, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, Department of Justice (*Platte B. Moring, III* on the motion) for the plaintiff.

Doherty and Melahn, (William E. Melahn on the motion) for the defendant.

MEMORANDUM OPINION

CARMAN, *Judge:* This action seeking the recovery of a penalty was dismissed by the Court pursuant to a joint motion for summary judgment. Defendant, F.H. Fenderson, Inc. (Fenderson), now seeks an award of attorneys' fees and expenses under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d)(1)(A).

As more fully explained below, the Court concludes that while this action was dismissed in Fenderson's favor, the plaintiff, United States, was substantially justified in pursuing this action. The Court therefore deems it inappropriate to award attorneys' fees and expenses to the defendant.

BACKGROUND

Plaintiff initiated this action against Fenderson on July 18, 1984. The action was commenced to recover a penalty in the amount of $1,668.16 for negligence in violation of section 592 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1592 (1982).

On December 10, 1985, plaintiff moved for summary judgment on the grounds that the allegations set forth in the complaint amounted to negligence *per se,* and that there were no genuine issues of material fact. In response, Fenderson contended that some material facts on the negligence claim existed. Fenderson also cross-moved

for summary judgment arguing that the Department of the Treasury, United States Customs Service (Customs) was illegally assessing multiple penalties for the same alleged violation; had failed to follow its own regulations with respect to voluntary disclosure; and had unlawfully refused to accept a supplementary petition.

On December 5, 1986, the Court denied both motions. *See United States* v. *F.H. Fenderson, Inc.*, 10 CIT ——, Slip Op. 86–126 (Dec. 5, 1986). A jury trial was scheduled to commence on April 27, 1987.

On March 16, 1987, the parties submitted a joint motion for the resolution of certain legal issues prior to trial. To assist the Court in its determination of these issues, the parties also submitted a stipulation of facts.

In their joint motion, the parties identified three legal issues to be resolved. The first issue concerned the question of whether or not § 1592 permits Customs to assess multiple penalties for the same alleged violation. This issue focused upon whether or not Customs could assess the exporter of certain merchandise, Landry and Landry, Ltd. (Landry) with one penalty and assess the customshouse broker as importer of record, Fenderson, with another penalty on the same merchandise. The second issue centered around the question of whether or not settlement with Landry without a reservation of rights against Fenderson effectively discharged the claim against the latter. The last issue concerned the question of whether or not the voluntary tender of supplemental duties by Fenderson on behalf of Landry after both had received prepenalty notices constituted a prior disclosure under 19 U.S.C. § 1592(c)(4)[1] when the District Customs officer did not refer the request of the Office of Investigations in accordance with 19 C.F.R. § 162.74(b).

In granting the motion for summary judgment, the Court ruled that Customs may not assess multiple penalties for the same alleged violation. *See United States* v. *F.H. Fenderson, Inc.*, 11 CIT ——, 658 F. Supp. 894, 899 (1987).[2] With respect to the second issue, the Court held that settlement of the case against Landry for its gross negligence did not terminate any cause of action Customs had against Fenderson for negligence. The Court held, moreover, that there was no need to reserve any rights to enforce this claim. *Id.* at

[1] This section provides in pertinent part as follows:

> (4) **Prior disclosure.**—If the person concerned discloses the circumstances of a violation of subsection (a) of this section before, or without knowledge of, the commencement of a formal investigation of such violation, with respect to such violation, merchandise shall not be seized and any monetary penalty to be assessed under subsection (c) of this section shall not exceed—
>
> * * * * * * *
>
> (B) if such violation resulted from negligence or gross negligence, the interest (computed from the date of liquidation at the prevailing rate of interest applied under section 6621 of Title 26) on the amount of lawful duties of which the United States is or may be deprived so long as such person tenders the unpaid amount of the lawful duties at the time of disclosure or within 30 days, or such longer period as the appropriate customs officer may provide, after notice by the appropriate customs officer of his calculation of such unpaid amount.
>
> * * * * * * *

19 U.S.C. § 1592(c)(4) (1982).

[2] In the decision, however, the Court recognized:

> [I]n the present situation it appears there could be two separate violations. Government is correct in asserting Customs is permitted under § 1592 to assess separate penalties for separate violations on the same merchandise. Therefore, the Court holds Government may endeavor to assess Landry and Fenderson separate penalties for separate violations, assuming, of course, the facts support such an endeavor.

Fenderson, 658 F. Supp. at 899 (footnote omitted).

900. Concerning the third issue, the Court held that Fenderson had made a prior disclosure of the violation of § 1592 and a tender of the actual loss of duties within the specified time period pursuant to that statute and 19 C.F.R. § 162.74(c).

In finding that the resolution of this final issue in favor of the defendant effectively disposed of the issues, the Court dismissed the action. *Id.* at 901–02. Defendant now seeks an award of attorneys' fees and expenses pursuant to the EAJA.

Discussion

An award of fees and expenses to the prevailing party for the costs of a civil action brought by or against the United States is available under the EAJA. The relevant subsection provides in pertinent part as follows:

> (d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses * * * incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C.A. § 2412(d)(1)(A) (1978 & Supp. 1987). In *Gavette* v. *Office of Personnel Management,* 785 F.2d 1568 (Fed Cir. 1986), the Court of Appeals provided the following rationale for an award under the EAJA:

> The 1980 EAJA rested on the premise that individuals and small businesses "may be deterred from seeking review of, or defending against unreasonable governmental action because of the expense involved in securing the vindication of their rights." The purpose of the EAJA was to "reduce the deterrents and disparity by entitling certain prevailing parties to recover an award of attorney fees, expert witness fees and other expenses against the United States."

Id. at 1571 (footnotes omitted).

In order to qualify for the award, the applicant must be a "prevailing party." Once eligibility is established, the Court may grant the request "unless the Court finds that the position of the United States was substantially justified or that special circumstances make an award unjust."

In the *Gavett* decision, the Court of Appeals provided the following interpretation of the term "substantial justification:"

> We hold that "substantial justification" requires that the Government show that it was *clearly* reasonable in asserting its position, including its position at the agency level, in view of the law and the facts. The Government must show that it has not "persisted in pressing a tenuous factual or legal position, al-

> beit one not wholly without foundation." It is not sufficient for the Government to show merely "the existence of a colorable legal basis for the government's case."

Id. at 1579 (footnotes omitted).

Fenderson contends that it has prevailed in the action since the Court resolved the third issue in its favor. While not disputing this contention, plaintiff maintains that the position of the United States was "substantially justified" as that term is understood, and that therefore an award of attorneys' fees and expenses is inappropriate.

In applying the statutory test as construed by the Court of Appeals, the Court holds that the plaintiff's posture in this action has been "clearly reasonable." In the words of the Court of Appeals, plaintiff has not pursued a course of action involving a "tenuous factual or legal position." 785 F.2d at 1579.

At all relevant times in this action, it is apparent that the plaintiff has treated the facts as establishing two separate violations of § 1592. Indeed, the Court upheld this treatment when it ruled that "[b]oth violations alleged were the result of separate and distinct acts committed by separate and distinct parties constituting separate and distinct violations." *Fenderson,* 658 F. Supp. at 899. The Court also held that settlement with Landry did not constitute a complete release of Fenderson even absent a reservation of rights against Fenderson, thus agreeing that the course of action pursued by the plaintiff was reasonable.

The more difficult question concerns the reasonableness of the plaintiff's actions with regard to the issue of prior disclosure. As previously discussed, the Court held in Fenderson's favor that there was a prior disclosure of the violation by Fenderson and a tender of actual loss of duties within the specified time period. This however, does not mean that Custom's action in this regard were not "clearly reasonable." *See Luciano Pisoni* v. *United States,* 11 CIT ——, Slip Op. 87–48 at 9 (April 9, 1987), *appeal docketed,* No. 87–1344 (Fed. Cir. May 7, 1987) ("Congress intended that an analysis under an EAJA perspective be independent from the decision on the merits").

Thus, while Fenderson's letter to the District Director of Customs on October 26, 1981 acknowledged the facts establishing the violation by Fenderson, this letter made no mention of the voluntary tender by Landry and did not request that Customs treat the matter as a prior disclosure. Similarly, the letter dated November 3, 1981 which contained the check for the unpaid duties in the name of Fenderson did not request treatment as a prior disclosure and did not disclose the circumstances concerning the violation. In fact, it appears that not once during the course of the administrative proceeding did Fenderson contend that the voluntary tender of unpaid duties on behalf of Landry be treated as a prior disclosure by Fenderson of the facts and circumstances surrounding the Fenderson violation.

Furthermore, Fenderson tendered payment on behalf of Landry and not for itself. The letter accompanying payment referred to the Landry prepenalty notice and made no reference to the circumstances surrounding the Fenderson violation. Thus, it was clearly reasonable for Customs not to have treated the voluntary tender of payment as a prior disclosure.

It was also clearly reasonable for Customs not to have allowed a prior disclosure after the issuance of a prepenalty notice since the agency was apparently following longstanding administrative practice in this regard.[3] Customs has taken the position that once a prepenalty notice has been issued, the Customs officer has already determined that there is reasonable cause to believe a violation of § 1592 has occurred. Thus, according to Customs, any responsive letter or voluntary tender of payment after issuance of a prepenalty notice does not disclose the circumstances of the violation and is thus not a prior disclosure.

In view of the above, the Court finds that the pursuit of this action by plaintiff was clearly reasonable and did not involve merely "a colorable legal basis for the government's case." *See* 785 F.2d at 1579. Accordingly, the defendant's motion for attorneys' fees and expenses is denied.

(Slip Op. 87–109)

Delco Electronics, Div., General Motors Corp., plaintiff *v.* United States, defendant

Court No. 85–10–01462

[Judgment in part for plaintiff.]

(Decided September 25, 1987)

Grunfeld, Desiderio, Lebowitz & Silverman (*Steven P. Florsheim, Robert B. Silverman*) for plaintiff.

Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Civil Division, United States Department of Justice (*Saul Davis*) for defendant.

Opinion

Restani, *Judge:* This action concerns the proper classification for tariff purposes of circuit boards assembled in Singapore and imported into the United States during the years 1978 through 1983, which were then incorporated into car radios and tape players. Depending on the type of board, the United States Customs Service (Customs) classified the boards as either car radio receivers or am-

[3] According to the plaintiff, this practice has now been codified at 19 C.F.R. § 162.74(g). *See* 51 Fed. Reg. 23047 (June 25, 1986).

plifiers. Plaintiff disputes the classifications and asserts that the boards classified as car radio receivers were parts of radio reception apparatus. It further asserts that the amplifiers were not "stand alone" amplifiers and could not be classified under the provision for amplifiers, but must be classified as machines and parts thereof.[1]

Amplifiers

At the conclusion of plaintiff's case defendant moved for judgment in its favor. The motion was granted as to the boards classified as amplifiers and the reasons for the ruling were fully set forth at that time. The main reasons will be repeated here. The case of *General Electric Co.* v. *The United States,* 2 CIT 84, 90–91, 525 F. Supp. 1244, 1249 (1981), *aff'd* 69 CCPA 166, 681 F.2d 785 (1982)[2] held that the amplifier portions of other articles (phonographs) were audio amplifiers, classifiable under item 684.70, Tariff Schedules of the United States (TSUS), the classification asserted by Customs here. Such classification seems consistent with the plain language of item 684.70 which merely lists, among other items, "audio-frequency electric amplifiers."

Plaintiff argues that the Brussels Nomenclature (1955),[3] which may be utilized as legislative history of TSUS, if the applicable language of TSUS is similar,[4] indicates that the relevant portion of item 684.70 should be construed to cover stand alone amplifiers only. The court in *General Electric* did not address the Brussels Nomenclature and it is likely that it was not addressed by the parties. This does not appear to be a sufficient reason not to follow the holding of the Court of Appeals.

For the sake of argument, the court considered plaintiff's legislative history argument.[5] Although the language of the Brussels Nomenclature tends to support plaintiff's view, it is written in exemplary rather than definitional terms. The use of words such as "generally" and "commonly" provides no clear indication that of all the articles commonly called "amplifiers," only stand alone amplifiers are to be classified under the broadly worded TSUS item. Accordingly, the court would not reject the plain language of TSUS on the basis of the inconclusive legislative history cited here. Customs' classification of the circuit boards which contain the audio amplifiers is correct.

[1] *See* item 678.50, Tariff Schedules of the United States (1978–83).

[2] The court adopted the Court of International Trade opinion.

[3] The complete title is the "Nomenclature for the Classification of Goods in Customs Tariffs."

[4] *See Toyota Motor Sales,* 7 CIT 178, 185, 585 F. Supp. 649, 656 (1984), *aff'd* 753 F.2d 1061 (Fed Cir. 1985)

[5] The relevant language is contained in the Explanatory Notes to the Brussels Nomenclature, Vol III at pp. 950–51 which reads:

> Audio-frequency amplifiers are used for the amplification of electrical signals of frequencies falling within the range of the human ear. The great majority are based on thermionic valves, but some are based on transistors. The high tension and heater current requirements of the valves are generally supplied by a built-in power pack, which may be fed from the mains or, particularly in the case of portable amplifiers, from electric accumulators; alternatively, the amplifier may be powered entirely by batteries.
>
> The input signals to audio-frequency amplifiers may be derived from a microphone, a gramophone pick-up, a magnetic tape head, a radio feeder unit, a film sound track head or some other source of audio-frequency electric signals. Generally speaking, the output is fed into a loudspeaker, but this is not always the case (pre-amplifiers, for example, feed into a succeeding amplifier).
>
> Audio-frequency amplifiers contain a volume control for varying the gain of the amplifier, and also commonly incorporate controls (bass boost, treble lift, etc.) for varying their frequency response * * *

RECEIVERS

A much more troublesome question is the proper classification of the circuit boards that contained many of the components of a receiver. Plaintiff asserts that the boards are merely parts of a receiver and thus must be classified under item 685.29, TSUS, which reads:

> Radiotelegraphic and Radiotelephonic transmission and reception apparatus; radio-broadcasting and television transmission and reception apparatus and parts thereof:
>
> * * * * * * *
>
> Other:
>
> * * * * * * *
>
> Other.

Customs' classification, item 685.21, includes the same superior heading and the immediately inferior "other," but specifically covers:

> Solid-state (tubeless) radio receivers:
>
> Designed exclusively for motor vehicle installation.

The question before the court, therefore, is whether the boards *per se* are substantially complete car radio receivers or whether they are parts of the same. *See* General Headnote 10(h), TSUS; *Daisy-Heddon, Div. Victor Comptometer Corp.* v. *United States,* 66 CCPA 97, 600 F.2d 799 (1979).

There is no dispute that plaintiff intended the circuit boards to be assembled with other components into articles which were to be installed in motor vehicles. The testimony at trial also revealed that the imported apparatus contained some parts of a type normally seen in car radios and generally not in radios for other purposes. The boards, in their condition as imported, however, were not designed to be installed in motor vehicles as car radio receivers.

Defendant argues that one first must decide whether the circuit boards are unfinished radio receivers before one addresses the "designed for" qualifying provision, citing General Headnote 10(c)(ii), TSUS. Plaintiff argues that one should consider suitability for motor vehicle installation in deciding whether the circuit boards are substantially complete articles rather than parts. General Headnote 10(c)(ii) states:

> (c) an imported article which is described in two or more provisions of the schedules is classifiable in the provision which most specifically describes it; but, in applying this rule of interpretation, the following considerations shall govern:
>
> * * * * * * *
>
> (ii) comparison are to be made only between provisions of coordinate or equal status, i.e. between the primary or main superior headings of the schedules or between coordi-

> nate inferior headings which are subordinate to the same superior heading.

The case at hand does not involve the issue of relative specificity, but deals with mutually exclusive provisions. Thus, Rule 10(c)(ii) would not appear to apply directly. Applying Rule 10(c)(ii) to bar the court from considering the entire tariff provision under which the imports were classified could prevent the court from properly effectuating legislative intent. In deciding whether the subject merchandise is properly dutiable under item 685.21, the court must consider whether it is a substantially complete receiver *for motor vehicle installation,* not whether it is a substantially complete receiver in an abstract sense or for some other unknown purpose. The court has no way of determining if an article is substantially complete without reference to its intended function.

No cases in this court or its predecessor have been discovered that address the question of what constitutes a car radio receiver. Thus, the court must analyze the generally applicable principles that determine whether a device is a substantially complete article or a part of the same.

The factors that come into play in deciding whether an article is substantially complete when it is missing some parts include:

> * * * (1) Comparison of the number of omitted parts with the number of included parts; (2) comparison of the time and effort required to complete the article with the time and effort required to place it in its imported condition; (3) comparison of the cost of the included parts with that of the omitted parts; (4) the significance of the omitted parts to the overall functioning of the completed article; and, (5) trade customs, i.e., does the trade recognize the importation as an unfinished article or as merely a part of that article.

Daisy-Heddon at 102.

For clarity's sake the court will examine the factors out of order starting with the fourth factor. The circuit boards clearly are missing items which are essential to their use as car radios, but *Daisy-Heddon* makes clear that this factor cannot be determinative. Nonetheless, the court must assess the significance of the omitted parts in relation to those components that are present. The basic electronic functions of any radio receiver are detection of radio signals, selectivity and amplification. *See Channel Master, Div. of Avnet, Inc.* v. *United States,* 10 CIT ——, 648 F. Supp. 10 (1986), and *General Electric.* It appears that virtually all of the electronic circuitry necessary to perform the basic functions of detection and amplification are contained on the circuit board. The selectivity circuitry, however, is incomplete.

Selectivity may be subdivided into Radio Frequency (RF) selectivity and Internal Frequency (IF) selectivity. The components for IF selectivity are present on the circuit board. The basic components for RF selectivity are missing from the circuit board. Although

some other types of receivers do not require RF selectivity, the testimony at trial was clear that a device lacks the basic capabilities of a car radio if it lacks RF selectivity.

Some witnesses opined that if one of the imported circuit boards were linked to a power source, speakers and an antenna, it would be capable of picking up one frequency on the FM band and one frequency on the AM band because of IF selectivity. A seemingly well-designed experimental use of the circuit board, however, failed to produce any sound resembling voices or music at any frequency. As no broadcast station transmits at the internal frequencies of the circuit board, this is not surprising.[6] There was also testimony that the IF selectivity components are more important because they perform the broader selectivity functions. This view was demonstrated to be related to abstract concepts of what constitutes a radio receiver and is not related to the actual functioning or capabilities of a car radio receiver. The court concludes that for car radios generally, and for the radio to be assembled here, in particular, RF selectivity is a basic electronic function which is very significant in relation to other car radio electronic functions. Thus, the circuitry necessary to this function is also very significant.

Also missing from the complete car radio receiver incorporating the circuit board is the metal chassis (a five-sided box) which has three basic functions. It holds the board and other parts of the receiver, it shields out engine interference and it prevents internal signals from interfering with the functions of other apparatus. There is some authority that a metal chassis is a basic part of a radio receiver. *See Symphonic Electronic Corp.* v. *United States,* 77 Cust. Ct. 147, 149–150, C.R.D. 76–5 (1976). It seems clear that for a car radio, in particular, a metal chassis is necessary to proper functioning.

In addition, all parts which allow tuning from station to station or enhance tuning of a car radio are missing. These range from internal mechanical apparatus to knobs, button covers, a faceplate and marker. Parts which allow tuning from one station to another are not important to some types of radios. *See e.g. NEC America* v. *United States,* 8 CIT 184 (1984), *aff'd,* 760 F.2d 1295 (Fed. Cir. 1985). For such receivers only one channel is necessary. Tunability from channel to channel is, however, a function of car radio receivers, as the testimony demonstrated, and, as indicated previously, all parts for this purpose are missing from the circuit board.[7]

The next factor to be considered is the fifth factor, trade identification. First, there is a problem with what constitutes the trade. The automobile industry, like any ordinary consumer, would not recognize these circuit boards as car radio receivers or substantially complete car radio receivers. It appears that those in the electronics

[6] There was some testimony that there are non-voice transmissions, for aircraft guidance purposes, at one of the internal frequencies. This seems irrelevant to the functioning of a car radio.

[7] Various other parts of the assembled car radio were not on the circuit boards. Included among the missing electrical parts mentioned in the testimony were an AM antenna trimmer capacitor, a choke, a spark plate and a dial lamp fixture. *See generally,* Exhibits 5 and 14.

industry most likely would refer to the merchandise as "receiver boards." The court concludes from this that neither industry accepts the merchandise as car radios, unfinished car radios or substantially complete car radios.

Assessment of the second factor involves a preliminary decision as to what is the proper comparison. The parties disagree as to whether one compares the time needed to make the entire imported boards including their component parts with the final assembly time in the United States or whether one may consider the time needed to make the parts added in the United States.[8] *Daisy-Heddon* did not involve addition of complicated componentry, and did not clearly decide this point. As the weighing of the factors is not a matter of precise mathematics, this debate may be purely academic. For the sake of argument, however, the court will apply the *Daisy-Heddon* factors narrowly and compare only final assembly time in the United States with the time needed to make the imported board and its component parts. The imported circuit board is made of various silicone chips and welds and other components on a board. The time to *make* the componentry assembled abroad and to assemble it abroad seems to be greater than the time needed to finally assemble the various parts after importation.[9] Although, as indicated, *Daisy-Heddon* does not address directly the time and effort needed to make the United States added components, it does address the related concept of cost of those components. Thus, the court should at least keep this in mind when deciding how much weight to give the second factor, if narrowly interpreted, in a case involving assembly of complicated components.

As to the first factor, plaintiff used ordinary business records and arrived at a parts count of approximately 160 for the imported circuit boards. Once again, using ordinary business records plaintiff arrived at a parts count of 306 for the United States added components. Defendant takes issue with plaintiff's parts count, but provided none of its own. Plaintiff's parts count is not the only one that could have been done. Purchased parts, no matter how many subparts they contained, were counted as one part. Although this is true for both the imported boards and the domestically added parts, there appear to be more uncounted subparts on the imported board side of the comparison. Nonetheless, as ordinary business records were used, and uniform standards were applied, the court will accept the count, but because of the subparts issue the court must consider the parts comparison as more equal than the numbers reflect.

As to the third factor, plaintiff's cost calculations were challenged on a variety of grounds, but no evidence was produced which con-

[8] Of particular focus was manufacture of the coil board, which involves precise coiling and alignment and various welds. The coil board was manufactured in the United States and joined in the United States with the imported circuit boards and other parts to form the complete radio.

[9] The testimony presented was not specific enough to make a more precise finding as to this factor. Given the other factors, this imprecision does not create sufficient doubt so that further evidence is required.

vinces the court that plaintiff's cost records are not reliable, or that they include any improper factors. Thus, the court accepts plaintiff's calculation as explained by the testimony of its accounting employee, Max McNeal, that more than one half of the cost of the finished article involved components added in the United States after importation.[10] Overall, the court concludes that significant parts, time, cost and effort were required to make a complete car radio receiver from the imported circuit board.

Although it is difficult to compare products, this case appears qualitatively different from the addition of a few parts to complete a fishing reel (*Daisy-Heddon*), the simple insertion of crystals into an otherwise complete scanner (*Channel Master*) or the addition of some wires, linkages and a cosmetic cabinet to a receiver that lacked no essential electronic parts (*General Electric*).[11] Even if one disregards the external, partially cosmetic elements, such as the button covers, faceplate, marker and knobs, at the very least, the car radio receiver would still lack internal tunability features, various RF selectivity components and a metal chassis. With all of these parts missing the circuit board is not a substantially complete car radio receiver.

To put this product in perspective, if one looks at the total costs of the United States labor and components added after importation they constitute approximately 70% of the total cost of the product. Defendant would argue that this is because domestic labor and related costs are higher. Such costs may be higher, but this does not account for the entire difference. The testimony at trial revealed that the parts added at final assembly in the United States are not just screws and simple metal pieces as in *Daisy-Heddon;* they include complicated components which require technical skill to make and to assemble into the final product. However the court looks at the imported boards, they are not substantially complete car radio receivers and may not be classified under item 685.21 as receivers designed for motor vehicle installation.

Accordingly, judgment is granted in favor of plaintiff respecting the boards classified as "receivers."

---

[10] Some components were made in the United States and shipped to Singapore for inclusion in the boards; they are included in the values of the imported boards. Presumably plaintiff will get any credit it is entitled to for such components under various provisions of the tariff schedules.

[11] No power source, speakers or outer cabinet are part of the product involved here. It is a very basic item even in its final assembled form.

(Slip Op. 87-110)

PISTACHIO GROUP OF THE ASSOCIATION OF FOOD INDUSTRIES, INC., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND CALIFORNIA PISTACHIO COMMISSION, ET AL., DEFENDANT-INTERVENORS

Court No. 86-08-01037

[Determination of ITA is remanded.]

(Dated September 29, 1987)

Harris & Berg (Cheryl Ellsworth) for plaintiffs.

Richard K. Willard, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch (*Platte B. Moring, III*), Civil Division, United States Department of Justice, for defendant.

Fried, Frank, Harris, Shriver & Jacobson (*David E. Birenbaum* and *Alan Kashdan*) for defendant-intervenors.

OPINION

RESTANI, *Judge:* Before the court is plaintiffs' Rule 56.1 motion for judgment based upon the record before the International Trade Administration of the Department of Commerce (ITA), which resulted in the final affirmative antidumping duty determination concerning *Certain In-Shell Pistachio Nuts from Iran.* 51 Fed. Reg. 18919 (1986).

Plaintiffs assert two bases for their claim that the determination is not supported by substantial evidence of record and is not in accordance with law. First, plaintiffs assert that use of official Iranian exchange rates to convert fair market value figures from Iranian rials to United States (U.S.) dollars was contrary to the antidumping laws, because actual market rates of exchange were ignored. Second, plaintiffs assert that ITA acted unreasonably in rejecting information provided by the respondent in the investigation, Rafsanjan Pistachio Producers Cooperative (RPPC), and by using the information submitted by petitioners.

Defendant responds that an appropriately promulgated, longstanding regulation required use of the official exchange rates in this case. Defendant further responds that the "best information available" rule allowed it to reject respondent's information on fair market value because respondent's answer to the questionnaire provided by ITA was incomplete, and further that it is permitted to use information supplied by the petitioner.

Defendant-intervenors take the same position as defendant, but also assert that both the exchange rate certified by the Federal Reserve Bank of New York and utilized by ITA, and the information submitted in its petition, were correct.

FACTS

Important to the analysis here are the following facts:

1. Throughout the period of the investigation the United States had no diplomatic relations with Iran. The questionnaires and the responses were transmitted through the government of Algeria.

2. The only respondent, RPPC, also the only known producer of pistachios in Iran, provided prices for its home market sales without clearly delineating which were for export and which were for domestic consumption. RPPC does not export. The pricing information was provided at the time slightly beyond the deadline established.

3. RPPC, though requested to do so, did not obtain sales information from exporters, but indicated to ITA who the likely exporters were.

4. During the preliminary investigation plaintiffs sought a declaration by ITA that the proceedings were extraordinarily complicated. Such a declaration would have triggered an extension of time to respond to the questionnaire. A shorter, four-week extension was granted on the basis that RPPC displayed some cooperation in the investigation. A similar request by the Government of Iran was denied because it was not a participant in the proceedings.

5. RPPC was advised in advance that the ITA would use the "best information available" if it did not receive complete responses.

6. The final dumping margin was set at 241.14 per cent *ad valorem;* the scope of the finding was clarified so that only raw pistachios were included.

7. Following an affirmative determination of threat of material injury by the International Trade Commission (ITC) an antidumping order was issued.

8. The official Iranian exchange rate is 90 rials to the dollar. Both the Central Bank of Iran and the International Monetary Fund use this rate. Plaintiffs admit this is the official rate and the Government of Iran claims it is the only legal rate in Iran.

9. During the relevant period some exchange transactions existed outside of Iran at the rate of 600–650 rials to the dollar. Evidence of published quotations from inside and outside Iran were presented to the ITA.

10. Most, if not all, of the margins found would be eliminated if an exchange rate of 600–650 rials to the dollar was used, as opposed to the 90 rial to the dollar official exchange rate.

11. The 90 rial rate has remained relatively constant despite tremendous inflation in Iran.

USE OF EXCHANGE RATES CERTIFIED BY THE FEDERAL RESERVE

Pursuant to 19 C.F.R. § 353.56[1] ITA, in order to administer the antidumping laws, must make currency conversions in accordance with 31 U.S.C. § 5151.[2] Because the Secretary of the Treasury did not publish a current value for the Iranian rial, and because there was no current buying rate specified by the Federal Reserve Bank of New York (N.Y. Fed), the N.Y. Fed was to specify an appropriate exchange rate, pursuant to statutory provisions, as incorporated by ITA's regulation.

The regulation seemingly is written in absolute terms; on its face it appears to permit no deviation from the section 5151 scheme. Although there are procedures for obtaining a hearing at the N.Y. Fed regarding the appropriateness of rates, there is no mechanism for direct judicial review of the rate setting decision. In cases involving assessment of duties under the customs laws, the Supreme Court has held that rates set by the N.Y. Fed are not subject to judicial review. *Barr* v. *United States,* 324 U.S. 83 (1945); *Hadden* v. *Merritt,* 115 U.S. 25 (1885); *Cramer* v. *Arthur,* 102 U.S. 612 (1880). The record is clear that ITA made no independent decision regarding the currency exchange rates, and ITA asserts it could not do so under its regulation.

The process described above has presented the court with two overlapping issues: first, whether a delegation of authority from ITA to the N.Y. Fed has occurred, and, if so, whether that delegation is valid; and, second, whether the ITA's interpretation of its regulation is correct, and if so, whether the regulation is valid under such an interpretation. These issues are addressed in detail below.

DELEGATION OF AUTHORITY

Initially, the parties disagree about whether section 353.56(a) constitutes a delegation of authority from ITA to the N.Y. Fed. Defendant-intervenor appears to contend that a valid subdelegation has occurred. Plaintiff contends that no delegation has taken place, but

[1] 19 C.F.R. § 353.56(a) [1980 and revision of Title 19 as of April 1, 1986] reads, in pertinent part, as follows:

> In determining the existence and amount of any difference between the United States price and the fair value or foreign market value for the purposes of this part or of the Act, any necessary conversion of a foreign currency into its equivalent in United States currency shall be made in accordance with the provisions of section 522 of the Tariff Act of 1930, as amended (31 U.S.C. § 372) [current version at 31 U.S.C. § 5151 (1982)].

[2] 31 U.S.C. § 5151 (1982) provides in pertinent part:

> (c) Except as provided in this section, conversion of currency of a foreign country into United States currency for assessment and collection of duties on merchandise imported into the United States shall be made at values published by the Secretary under subsection (b) of this section for the quarter in which the merchandise is exported.
> (d) If the Secretary has not published a value for the quarter in which the merchandise is exported, * * * the conversion of the currency of the foreign country shall be made at a value—
>
> (1) equal to the buying rate at noon on the day the merchandise is exported; or
>
> (2) prescribed by regulation of the Secretary for the currency that is equal to the first buying rate certified for that currency by the Federal Reserve Bank of New York under subsection (e) * * *.
>
> (e) The Federal Reserve Bank of New York shall decide the buying rate * * * The Secretary shall publish the rate at times and to the extent the Secretary considers necessary. In deciding the buying rates, the Bank may
>
> (1) consider the last ascertainable transactions and quotations (direct or through exchange of other currencies); and
>
> (2) if there is no buying rate, calculate the rate from—
>
> (A) actual transactions and quotations in demand or time bills of exchange; or
> (B) the last ascertainable transactions and quotations outside the United States in or for exchange payable in United States currency or foreign currency.

that if such delegation did exist, it would be invalid. Defendant argues that no delegation or subdelegation has occurred because ITA merely "rel[ied] upon the particular institution that Congress has designated to develop and issue exchange rates for duty assessment and collection purposes." Defendant's Supplemental Brief at 3. According to defendant, the exchange rates set by the N.Y. Fed are comparable to other types of information that ITA routinely uses during its investigations. Specifically, defendant notes that in critical circumstances determinations, ITA may rely upon dumping determinations made by other countries and import statistics provided by the Bureau of Census. *See* 19 U.S.C. § 1673b(e)(1) (1982). In countervailing duty investigations, ITA apparently also relies upon interest rate benchmark figures provided by appropriate agencies in foreign countries to determine whether loans that are inconsistent with commercial considerations have been made. *See* 19 U.S.C. § 1677(5)(B)(i) (1982).

The analogy drawn between exchange rates and these other forms of information fails. ITA states that it has no discretion to review exchange rates set by N.Y. Fed, but it has not made a similar claim with respect to the other information it uses. Furthermore, ITA is required by regulation to obtain rates from N.Y. Fed during the course of the antidumping proceeding, even when N.Y. Fed has not published such rates in the ordinary course of its business. In ITA's other examples, the information gathered is not prepared specifically at the request of ITA, nor is its preparation an integral part of ITA's procedure.

The defendant also contends that there has been no delegation because the calculation of LTFV margins is merely incident to the calculation of rates for the collection and assessment of duties under section 5151. In essence, defendant argues that by authorizing the N.Y. Fed to calculate exchange rates for assessment and collection purposes, Congress implicitly delegated the authority to calculate rates for related procedures.

This interpretation of section 5151 obfuscates the distinction that our Court of Appeals has drawn between LTFV determinations and the collection and assessment process. In *Melamine Chemicals, Inc.* v. *United States,* 732 F.2d 924 (Fed. Cir. 1984), the court specifically rejected appellee's argument that the "assessment and collection" language contained in section 5151 encompasses ITA's fair value investigation. The court stated:

> Melamine incorrectly asserts that the ultimate purpose of a fair value investigation and calculation is the assessment and collection of antidumping duties. The purpose of a fair value investigation is to determine whether LTFV sales are occurring to the injury of domestic industry. Such investigations may or may not result in the assessment and collection of antidumping duties.

> The notion that assessment and collection includes calculation of fair value, so that the two phases must be merged as argued by Melamine, has been laid to rest by the Supreme Court in *United States* v. *George S. Bush & Co.*, 310 U.S. 371 (1940), and in *Barr* v. *United States*, 324 U.S. 83 (1945).

Melamine, 732 F.2d at 929. In light of the *Melamine* decision and the significant role played by the N.Y. Fed in the process of calculating dumping margins, the court concludes that a delegation has occurred.

The parties do not question ITA's authority to delegate the calculation of exchange rates. Although such authority is not explicitly granted in any statutory provision, the courts have generally upheld similar delegations particularly where, as here, the agency is charged with the administration of a complex regulatory program.[3] K. Davis, *Administrative Law Treatise*, § 3.17 (2d ed. 1978) (discussing *EEOC* v. *Raymond Metal Products Co.*, 530 F.2d 590 (4th Cir. 1976)); *see also Tabor* v. *Joint Board for the Enrollment of Actuaries*, 566 F.2d 705 (D.C. Cir. 1977). The dispute in the instant case does not concern ITA's authority to delegate some authority, but rather, whether it may delegate to the N.Y. Fed *all* of its authority to select an appropriate exchange rate in the situation at hand.

Delegations of administrative authority are suspect when they are made to private parties, particularly to entities whose objectivity may be questioned on grounds of conflict of interest. *See Sierra Club* v. *Sigler*, 695 F.2d 957, 963, n.3 (1983) (citing *Sierra Club* v. *Lynn*, 502 F.2d 43, 58–59 (5th Cir. 1974), *cert. denied*, 421 U.S. 994 (1975)). The New York Fed is part of the national Federal Reserve System and subject to supervision by the Board of Governors of the Federal Reserve System,[4] but it is also a private corporation whose stock is owned by the member commercial banks within its district. *See Committee for Monetary Reform* v. *Board of Governors of the Federal Reserve System*, 766 F.2d 538, 540 (D.C. Cir. 1985). Although member banks lack the direct control over decision-makers enjoyed by most corporate shareholders, it is not unreasonable to assume that, where possible, officials at N.Y. Fed would pursue policies that enhance the health of member banks. Extrapolating from this, it is not difficult to imagine a situation in which the interest of the bank's members might conflict with the bank's responsibility to formulate accurate exchange rates under section 5151.[5] For example, the adoption of a slightly distorted exchange rate pursuant to ITA's regulation could prevent an affirmative finding of LTFV sales that otherwise would be proper. This would enable foreign countries to

[3] According to the notice published in the Federal Register, the regulation at issue was promulgated pursuant to 19 U.S.C. § 2504(b) (1982) and 5 U.S.C. § 301 (1982). 45 Fed. Reg. 8182, 8190 (1980). These provisions generally allow the Secretary of Commerce to promulgate regulations necessary for the administration of departmental programs and international trade agreements.

[4] The Board members are appointed by the President with the advice and consent of the Senate for fourteen year terms. *See* 12 U.S.C. § 241 (1982). Officers of the N.Y. Fed. are appointed through a combination of actions of the Federal Reserve Board and the member banks. 12 U.S.C. §§ 304–5 (1982).

[5] The court does not find that any impermissible actions were taken here, merely that the potential for abuse exists under defendant's view. To the court's knowledge, there are no published procedures governing the calculation of exchange rates under 31 U.S.C. § 5151, which further increases the potential for abuse.

sell more goods in the United States, thereby increasing their ability to repay loans made by member banks of the N.Y. Fed. Distorted exchange rates could also result in improper affirmative dumping findings. Such determinations could benefit member banks holding loans from domestic industries adversely affected by competition from imports.[6] Even though there have been no allegations of such behavior, the possibility that such conflicts could exist in certain situations cannot be ignored in the context of a legal regime which purports to exempt rate decisions of the N.Y. Fed from all forms of judicial and administrative scrutiny.

The parties have focused their attention in the delegation area on the more limited area of subdelegation. As defendants have noted, in recent years the courts have readily accepted subdelegations of authority within agencies. *See, e.g., Fleming* v. *Mohawk Wrecking and Lumber Co.,* 331 U.S. 111 (1947) (upholding subdelegation of subpoena power). *See also* K. Davis, *Administrative Law Treatise* § 3.16 (2d ed. 1978). The case on which plaintiff relies, *Cudahy Packing Co.* v. *Holland,* 315 U.S. 357 (1942), has been distinguished repeatedly and no longer remains authoritative. *See Administrative Law Treatise* § 3.16, and cases cited therein. It is important to note, however, that the instant case stretches the concept of proper subdelegation well beyond the parameters of past precedent. In the cases cited by the parties, authority was subdelegated to inferior officers *within the same agency.*[7] Presumably there is accountability if the decision is made within the same agency. Furthermore, the decisions made pursuant to subdelegation were not absolutely immune from review, as defendants contend the exchange rate decisions are in this case. The courts have consistently required subdelegation of significant functions to be checked by some form of review, either within the agency itself, or ultimately by the courts.[8] Lower level procedural decisions generally require less oversight than decisions which affect the substantive rights of regulated parties, or which embody the agency's most potent use of its discretionary authority. In all cases cited by the parties, however, courts were willing to approve subdelegations only if they ultimately were sub-

---

[6] Some of the potential conflicts discussed above are already inherent in section 5151. Because the N.Y. Fed possesses unreviewable discretion to set exchange rates for assessment and collection purposes, it can already control the ultimate amount of duties paid where an affirmative LTFV finding has been made. The mere presence of this authority, however, cannot justify an extension of discretion into the process of calculating LTFV margins. As discussed earlier, our Court of Appeals has distinguished the fair value stage of a dumping investigation from the assessment and collection stage. The expansion of unreviewable discretion into the LTFV determination would blur the distinctions drawn by the Court of Appeals in *Melamine Chemicals.*

[7] In *Tabor* v. *Joint Board for the Enrollment of Actuaries, supra,* plaintiff alleged that a delegation was made to a private agency. The court seems to conclude that no delegation occurred or that whatever was done was authorized by Congress. 566 F.2d at 708 n.5. The discussion in the following part makes clear that total delegation here is not authorized by Congress. It is also clear that the decision relied on in *Tabor* was not one which was made at the alleged delegator's request, as in the case at hand. *See infra,* note 12. Furthermore, there is no indication that the alleged delegator in *Tabor* was absolutely bound by the decision made by the private agency.

[8] Obvious parallels can be drawn between the demise of the nondelegation doctrine, since *A.L.A. Schechter Poultry Corp.* v. *United States,* 295 U.S. 495 (1935) (holding invalid standardless delegation of legislative power to the President made in section 3 of The National Industrial Recovery Act), and the increasing frequency with which intra-agency subdelegations of authority have been approved. Both developments reflect a growing sense that agencies should be given broader authority to develop procedures and standards necessary for their proper functioning. In the delegation area, the broadening of statutory delegations of authority has been accompanied by an expansion of judicial and administrative controls on administrative behavior. *See* H. Leventhal, *Principled Fairness and Regulatory Urgency.* 25 Case W. Res. 66, 70 (1974). Comparable measures provide an appropriate check on transferred powers in the area of subdelegation.

ject to some form of scrutiny.[9] Although the calculation of exchange rates in a LTFV investigation is an intermediate step in ITA's determination, it nevertheless can alter completely the outcome reached by the agency. Given the importance of the type of exchange rate determination at issue to the outcome of the investigation, the determination must be considered a significant function entrusted to the ITA by Congress. Such a decision cannot be abandoned to an independent agency with private sector components, and isolated from all types of review, administrative or judicial, merely for reasons of convenience.

Therefore, the court concludes that if utilization of exchange rates set by the N.Y. Fed solely at the request of ITA for purposes of making an LTFV determination is not subject to ITA decision-making, an invalid delegation of ITA's authority has occurred.

The Validity of the Regulation and Its Interpretation

Our Court of Appeal has clearly articulated the standard for reviewing the validity of regulations promulgated by ITA under the dumping law. In *Melamine Chemicals* the court stated:

> When the issue is the validity of a regulation issued under a statute an agency is charged with administering, it is well established that the agency's construction of the statute is entitled to great weight * * *. Similarly, agency regulations are to be sustained unless unreasonable and plainly inconsistent with the statute, and are to be held valid unless weighty reasons require otherwise.

732 F.2d at 928. (Citations omitted.) *See also Consumer Products Safety Division, SCM Corp.* v. *Silver Reed America, Inc.,* 753 F.2d 1033 (Fed. Cir. 1985). The Supreme Court has held that long-standing agency regulations, such as section 353.56(a), are entitled to greater deference from the reviewing court.[10] *Zenith Radio Corp.* v. *United States,* 437 U.S. 443, 457 (1978).

The reasonableness of the regulation, at least as it applies in most cases, is not in serious dispute. Intervenor has argued persuasively that symmetry in the calculation of exchange rates is desirable in the investigative and assessment phases of an antidumping investigation. When exchange rates are consistent, importers subject to antidumping orders can be assured that the duties they are required to deposit will not vary from the final assessment solely

---

[9] The nature of the decision that has been delegated may determine the level of administrative or judicial oversight that is required in a given case. For example, in *E.E.O.C.* v. *Raymond Metal Products Co.,* 530 F.2d 590 (4th Cir. 1976), the court considered the validity of two separate subdelegations to a district director: first, the delegation of intermediate administrative functions; and second, the delegation of the Commission's authority to sue. The court held that the district director's decision as to intermediate matters need not be reviewed by the entire Commission because adequate judicial safeguards existed. 530 F.2d at 594. The court also upheld the transfer of the Commission's authority to sue. Noting that civil actions were not commenced until formal approval had been received from the Commission, the court held that no subdelegation had taken place. 530 F.2d at 595. (One might argue that decisions to bring suit may be made by intra-agency subdelegees unless expressly or impliedly forbidden by Congress, because the substantive rights will be subject to judicial disposition.) *See also E.E.O.C.* v. *Exchange Security Bank,* 529 F.2d 1214 (5th Cir. 1976) (no subdelegation where agency by regulation has retained power to decide whether or not to set aside officer's decision about revoking or modifying a subpoena). *See infra* discussion in following part.

[10] The regulation at issue has existed in its current form since 1980. *See* 45 Fed. Reg. 8190 (1980). A similar regulation first appeared in the Federal Register in 1943. *See* 8 Fed. Reg. 8327 (1943).

because of selection of a different basis for establishing exchange rates. *See* 19 U.S.C. § 1673e(a)(3) and 1673g(a). Furthermore, the use of exchange rates set by the N.Y. Fed reduces the overall administrative burden on ITA, thereby increasing the probability that investigations will be completed within the prescribed statutory time limit.[11] Thus, the regulation appears reasonable, at least insofar as it promotes consistency and looks to an experienced agency to provide exchange rates, thereby expediting the administrative process. The remaining issue is whether the agency has interpreted the regulation in a permissible manner.

As with the statute it administers, an agency's interpretation of its regulations is entitled to substantial weight, particularly where the interpretation is longstanding and has established expectations among parties appearing before the agency. In the instant case, however, such deference is not justified. First, the agency's interpretation would create an improper delegation; and second, although the regulation has been in existence nearly forty years, the issue raised in this case stems from a recent interpretation of the regulation. This appears to be the first time a party has requested ITA to review exchange rates calculated by the N.Y. Fed.

ITA has argued that its interpretation of the regulation is required by the regulation's command that exchange rates in LTFV determinations *shall* be calculated in accordance with section 5151. ITA contends that the presence of this imperative language eliminates its discretion to conduct any subsequent review.

The presence of words such as "shall" in a regulation or statute will generally limit an agency's discretion. Here, however, such a construction is inconsistent with the transfer of function that occurs under the regulation. ITA cannot compel the N.Y. Fed to make an exchange rate determination in an LTFV investigation, as it has no authority over the N.Y. Fed. Because ITA has no means to compel or expedite the determination, there is a possibility that the N.Y. Fed, perhaps because of overwork or a new-found lack of comity with the Commerce Department, could fail to act pursuant to ITA's request. The lack of control that characterizes this process must be offset by some residual discretion that allows ITA to set rates if the N.Y. Fed fails to act properly. Without such discretion, ITA cannot fulfill the goals of expediency and efficiency that the regulation was originally designed to achieve. Thus, the imperative language in the regulation cannot support an interpretation which

[11] Intervenor also argues that harmonizing the exchange rates would facilitate the automatic assessment of dumping duties which may occur under section 611(a)(2) of the Trade and Tariff Act of 1984, Pub. L. No. 98–573, 98 Stat. 2948, 3031 (1984) (codified at 19 U.S.C. § 1675(a)(1) (Supp. II 1984)). Under current law, when a party fails to request an annual review of an antidumping order, duties are automatically assessed at rates equal to the cash deposit rate for estimated duties on entries made (usually) in the twelve preceding months. 19 C.F.R. § 353.53a(d) (1987). Intervenor argues that, in order for this assessment process to be fully automatic, the exchange rates set by the N.Y. Fed must be used to calculate the estimated deposit in connection with the original investigation.

This argument is not persuasive. If no request is made for an annual review, exchange rates set by the N.Y. Fed will govern estimated deposits and the ultimate assessment of duties. What intervenor is actually objecting to is the right of a party to challenge exchange rates upon which estimated duties are based. This is the only way the automatic assessment process could be interrupted. If the Court concludes that LTFV determinations may be challenged on the basis of inaccurate exchange rates, parties presumably would be able to request an annual review to address the same issue. Intervenor's argument, therefore, merely begs the question that is already at issue in this case.

completely divests ITA of the discretion it needs to fulfill its statutory purposes.

Furthermore, the policies of the antidumping law require that ITA's residual discretion include the ability to avoid error in cases where the N.Y. Fed has chosen an incorrect exchange rate. Our Court of Appeals has recognized that findings of LTFV sales are not appropriate when they result solely from the misapplication of exchange rates. In *Melamine Chemicals,* the court upheld ITA's use of a 90-day lag rule for selecting exchange rates and stated:

> Though the CIT noted that the United States had cited "no authority for using a 90 day lag rule", that authority stems from *Commerce's duty to enforce fairly the antidumping laws by determining whether LTFV sales are or are not occurring.* The purpose of the antidumping law, as its name implies, is to discourage the practice of selling in the United States at LTFV by the imposition of appropriately increased duties. That purpose would be ill-served by application of a mechanical formula to find LTFV sales, and thus a violation of the antidumping laws, where none existed. A finding of LTFV sales based on a margin resulting solely from a factor beyond the control of the exporter would be unreal, unreasonable, and unfair.

732 F.2d at 933 (emphasis added). *See also Luciano Pisoni Fabrica Accessori Instrument Musicali* v. *United States,* 11 CIT——, 640 F. Supp. 255, 260 (CIT 1986).

Defendants have argued that the language cited above is not relevant because the *Melamine* court was interpreting a separate regulation. The court's opinion apparently reserved judgment on the issue presented in this case. *See* 732 F.2d at 930. Nevertheless, it would be shortsighted to confine the Court of Appeals' guidance to the regulation at issue in *Melamine.* An improper exchange rate will distort an LTFV determination, regardless of whether it results from an error in calculation, or the selection of a valid rate from an improper period in time, or from the type of problems which may exist here. In any case, the agency must exercise its residual discretion to ensure that LTFV sales have actually been made.

ITA's interpretation of the regulation would also impermissibly restrict the court's scope of review in this matter. As discussed earlier, ITA review of the rates used in the LTFV determination is necessary to preserve the legality of the delegation of authority made to the N.Y. Fed. ITA's decisions in this area are subject to judicial review. *See* 19 U.S.C. § 1516a(b)(1)(B) (1982) and 28 U.S.C. § 1581(c) (1982). Furthermore, but for the promulgation of the regulation and the interpretation it has been given, it is clear that ITA would have been responsible for determining exchange rates. Because the court has no jurisdiction to review N.Y. Fed's exchange rate determinations directly, the regulation, as interpreted by ITA, effectively prevents the court from deciding whether exchange rates (and ultimately LTFV decisions) are supported by substantial evidence. The

interpretation defendant has given the regulation would thus create a major exception to the general standard of reviewability that governs ITA determinations.

Defendants have argued that a judicially imposed requirement of independent decision-making will prevent ITA from making timely determinations, and force it to make decisions in an area in which it has little expertise. These concerns carry little weight. As discussed earlier, ITA currently lacks control over the timing of the N.Y. Fed's decision; thus, no mechanism currently exists to ensure that exchange rate determinations are made in a timely manner. Furthermore, the facts of this case present an unusual situation that is not likely to recur on a regular basis. Here, ITA had to resort to rates calculated at its request by N.Y. Fed because no quarterly rates had been published by the Treasury Department and no buying rates existed. Rates which are used on a regular basis in actual transactions are more reliable and would be subject to fewer disputes.[12] The difficulty of identifying a rate in this case stemmed from an unusual combination of political, commercial, and diplomatic factors which necessitated ITA's request and resulted in the subsequent dispute over the propriety of the rate.

Finally, ITA's claims of naivete in this area are overstated. When it determines whether exchange rate policies constitute countervailable benefits, ITA may be required to look at the differences between official rates and free-market rates. In fact, in a companion case to this action, ITA determined that a countervailable benefit existed in part based on allegations that exporters could sell retained foreign exchange at market rates. *See* 51 Fed. Reg. 8344, 8345 (March 11, 1986). Plaintiffs allege that the market rate utilized in that determination was similar to the one asserted by plaintiffs here.[13]

By finding that the regulation at issue must be interpreted to provide for ITA decision-making and resulting judicial review, the court may have assuaged its concerns regarding delegation of authority. As noted earlier, the availability of administrative and judicial review may cause a court to conclude that no delegation has occurred. *See Exchange Security Bank*, 529 F.2d at 1218. If review is required of the exchange rates, ITA's reliance upon them could be viewed as a limited procedural process, perhaps undeserving of the label "delegation."

Cases such as *Exchange Security Bank* simply illustrate the necessity of requiring some check on transferred authority. By ruling that "no delegation has occurred" rather than finding that a given delegation is proper, courts may avoid answering difficult separation of powers and related questions or objections to the degree of

[12] In any case, this court does not reach the issue of whether ITA must retain decision-making authority when it is using ordinary published rates. ITA does not initiate the setting of such rates; therefore, there is less reason to view reliance upon such rates as delegation of authority, with all of the attendant problems of that concept.

[13] It is true that the market rate ITA used was the "best information available" and was obtained from the petition. The decision indicates, however, that ITA would have made a further investigation if respondent had provided adequate information.

power transferred.[14] Regardless of whether the easier or more difficult analytical course is followed, the court's conclusion ultimately must depend, in part, on the type of review provided. Accordingly, the court holds that the ITA erred in failing to consider, when requested to do so, what exchange rate should be utilized in order to carry out the antidumping laws.

Use of "Best Information Available"

The ITA's final determination in this matter relied on the "best information available," 19 U.S.C. § 1677e (1982 and Supp. III 1985),[15] in order to calculate foreign market value. The information used was that supplied by petitioner. Plaintiffs' claim that the information supplied by RPPC was inherently more reliable because of RPPC's presence in Iran, and that ITA erred in using the petitioner's information under the "best information available" provision.[16]

RPPC indicated that because it was not an exporter of pistachios it could not provide the information requested concerning which of RPPC's sales were home market sales and which were sales of pistachios destined for export. Such information is necessary so that ITA may make the comparisons required by the antidumping laws. 19 U.S.C. § 1673, *et seq.* Although the lack of diplomatic relations between Iran and the United States probably exacerbated the "inability" to provide the proper information in a timely manner, this does not relieve RPPC of its duty to provide the information. To the contrary, the absence of diplomatic relations made it highly reasonable for ITA to rely on the one party with whom it made contact to provide the necessary information, either on its own or by contacting exporters known to it, so that actual values could be ascertained. The ITA was never able to obtain pricing information from exporters or pricing information from RPPC for pistachios sold for export, as compared to those sold for domestic consumption. It never verified the partial information provided.

The best information rule prevents a respondent from controlling the results of the investigation by providing partial information or by delaying or otherwise hindering the investigation. *See Atlantic Sugar, Ltd.* v. *United States,* 744 F.2d 1556, 1560 (Fed. Cir. 1984). Given ITA's lack of subpoena power, the rule of section 1677e(b)

[14] The parties raised no Constitutional challenges to the regulation as interpreted by defendant. Perhaps any constitutional questions involving delegation of functions to independent agencies are easily resolved because of the limited nature of the functions involved. There is no need to explore these questions so long as the regulation is interpreted to require ITA to exercise its own decision-making powers in this case.

[15] 19 U.S.C. § 1677e provides in part

(a) **General Rule.**—* * * If the administering authority is unable to verify the accuracy of the information submitted, it shall use the best information available to it as the basis for its action, which may include in actions referred to in paragraph (1) [a final determination] the information submitted in support of the petition.

(b) **Determination to be made on best information available.**—In making their determinations under this subtitle, the administering authority and the Commission shall, whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, use the best information otherwise available.

[16] Although he court will address this issue, it does not appear to be a serious question in this case. This point is raised almost as an afterthought in plaintiffs' main brief. In their response defendant-intervenors pointed out that, if adjusted for relevant levels of trade, plaintiffs' and defendant-intervenors' figures for foreign market value are essentially equivalent. Plaintiffs did not respond to this in their reply.

may be the most effective means of compelling a recalcitrant party to provide necessary information.

The record reflects a reluctance to comply with the investigation on the part of RPPC. ITA's grant of an extension of time to RPPC to comply, and the warning to RPPC of the possible use of the "best information available," demonstrates a reasonable approach in view of the lack of full cooperation. Given the lack of complete information from RPPC, ITA was justified in not proceeding to verify the information RPPC provided and in relying on the information supplied by petitioner, the "best information otherwise available." 19 U.S.C. § 1677e(b).

In accordance with the reasoning above, this matter is hereby remanded to ITA. ITA shall determine whether utilization of the exchange rates set by the N.Y. Fed improperly creates artificial dumping margins in this case.

(Slip Op. 87-111)

TOHO TITANIUM CO., LTD., PLAINTIFF *v.* UNITED STATES, THE U.S. DEPARTMENT OF COMMERCE, AND THE U.S. INTERNATIONAL TRADE COMMISSION, DEFENDANTS AND RMI CO. AND TITANIUM METALS CORP. OF AMERICA, INTERVENORS

Court No. 85-1-00024

Before DICARLO, *Judge.*

[The action is remanded.]

(Decided September 30, 1987)

Graham & James (Denis H. Oyakawa, James H. Broderick, Jr. and *Patrick J. Fields)* for plaintiff.

Richard K. Willard, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, Department of Justice *(Sheila N. Ziff); Lisa B. Koteen,* Office of the Deputy Chief Counsel for Import Administration, for defendants.

Wilmer, Cutler & Pickering (A. Douglas Melamed, John D. Greenwald and *Deborah M. Levy); John F. Hornbostel, Jr.,* RMI Company, for intervenor RMI Company.

Pillsbury, Madison & Sutro (Donald E. de-Kieffer and *Francis J. Sailer); Frederick W. Steinberg,* Titanium Metals Corporation of America, for intervenor Titanium Metals Corporation of America.

MEMORANDUM OPINION AND ORDER

DICARLO, *Judge:* Plaintiff, Toho Titanium Company, Ltd. (Toho), a Japanese exporter of titanium sponge, brought this action challenging the final determination by the United States Department of Commerce, International Trade Administration (Commerce) that titanium sponge from Japan is being sold in the United States at less

than fair value. *Titanium Sponge From Japan: Final Determination of Sales at Less Than Fair Value,* 49 Fed. Reg. 38,687 (Oct. 1, 1984). Toho contested Commerce's decision to use constructed value rather than sales of titanium sponge in Japan as the basis for determining foreign market value. Pursuant to section 773 (b) of the Tariff Act of 1930 (Act) as amended, 19 U.S.C. § 1677b(b) (1982), Commerce must use sales in the home market to calculate foreign market value unless it determines that home market sales have been made at a price less than the cost of production over an extended period of time in substantial quantities and at prices which will not permit recovery of all costs within a reasonable period of time in the normal course of trade.

In its opinion on Toho's motion for a judgment upon the agency record under Rule 56.1, this Court held that "there is substantial evidence on the record supporting Commerce's determination that below cost of production sales were made over an extended period of time and in substantial quantities for the Japanese titanium sponge industry." *Toho Titanium Co.* v. *United States,* 11 CIT ——, 657 F. Supp. 1280, 1285 (1987). The Court remanded the action to Commerce, however, for an explanation on the record as to why Toho will not be able to recoup its costs over a reasonable period of time in the normal course of trade from sales at prices charged during the investigatory period. *Id.,* 657 F. Supp. at 1286.

The Court found such an explanation was required before it could evaluate whether the data gathered by Commerce during its investigation provided substantial evidence to support the determination that sales at the prices charged below cost will not permit recovery of all costs within a reasonable period of time in the normal course of trade. The Court stated that Commerce "*may* rely on data covering only a six-month period" as long as such data provided substantial evidence to support Commerce's determination on this issue. *Id.*

If Commerce's determination on this issue is found not to be supported by substantial evidence, the Court must hold it unlawful pursuant to the standard of review provided under section 516A(a)(2) of the Act, as amended, 19 U.S.C. § 1516a(a)(2) (1982). Commerce then would be required to use sales of titanium sponge in Japan to determine foreign market value rather than constructed value. On remand, therefore, Commerce was directed to show the Court that the determination that Toho will not be able to recover all costs within a reasonable period of time in the normal course of trade from sales at the prices charged during the investigation period is supported by substantial evidence on the record.

In its remand results, Commerce first states: "One hundred percent of Toho's home market sales were made at prices below its cost of production during the period of investigation. It is the Department's practice reasonably to assume that when 100 percent of sales are at prices below the cost of production, those prices will not permit recovery of all costs within a reasonable period of time in

the normal course of trade." *Results of Remand Proceeding, Toho Titanium Company, Ltd.* v. *United States,* Court No. 85-1-00024 (April 16, 1987) *(Results of Remand)* at 2.

As noted in the Court's earlier opinion, the legislative history pertinent to 19 U.S.C. § 1677b(b) advises Commerce to be careful in reaching its determinations under this section. *Toho Titanium,* 657 F. Supp. at 1285–86. When discussing section 321 of the Trade Act of 1974, the section which added subsection (b) to section 205 of the Antidumping Act of 1921 (the predecessor to section 1677b(b)), Congress indicated that sales of certain products, such as commercial aircraft, should be carefully evaluated because such products "typically require large research and development costs which could not reasonably be recovered in the first year or two of sales." S. Rep. No. 1298, 93rd Cong., 2d Sess. 173 (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 7186, 7310; *see also* H.R. Rep. No. 571, 93rd Cong., 1st Sess. 71 (1973).

Commerce should not assume as a matter of department practice, therefore, that a company cannot recoup its costs in a reasonable period of time in the normal course of trade even where 100% of home market sales over a six-month investigatory period are made at prices below the cost of production. A company may be justified in taking a loss over an even greater period of time if it expects sales to increase and production costs to decrease, perhaps due to more efficient production and the averaging of initial investment costs over time. The Court does not find the assumption drawn by Commerce from the percentage of sales made below cost of production during the investigatory period to be evidence in support of the determination at issue.

Commerce next states:

> The record in this proceeding does not provide any basis to conclude that Toho's cost or prices were changing to an extent that would permit the company to recover all costs within any reasonable time period. Toho submitted cost data to the Department of Commerce on (1) its cost of manufacturing titanium sponge, (2) its cost of financing sponge production and sales, and (3) its selling, general and administrative ("GS&A") expenses associated with titanium sponge production and sales. The costs that were submitted by Toho do not show any significant trend up or down.

Results of Remand at 2–3.

These statements indicate to the Court that Commerce did not fully understand the purpose of a remand in this action. The issue on remand is not whether the record supports the conclusion that Toho would be able to recover its costs at the prices charged during the investigatory period within a reasonable period of time in the normal course of trade, but whether there is substantial evidence on the record supporting Commerce's determination that Toho *could not recover* its costs at these prices in such time period.

The conclusion by Commerce that costs data collected over six-months "do not show any significant trends up or down" does not, in and of itself, provide evidence to support Commerce's determination. Commerce may be able to demonstrate to the Court, using either the data already collected or, if necessary, by collecting further data, that Toho's cost of production will remain essentially the same for a reasonable period of time in the normal course of trade such that Toho could not recoup its costs at the investigatory prices (found to be below production cost) in such time period. Finding on remand that the costs data do not show any changing trends without offering supporting calculations or an analytical explanation, however, is not sufficient evidence to persuade the Court on this point.

Toho argues in its reply to the remand results that Commerce could not accurately project future production costs using only six-months of data, especially when such data was collected at a time Toho was operating at only 35% capacity. According to Toho, Commerce would need data demonstrating that per unit costs would not decrease in the future as sales increased before determining that sales at the prices charged during the investigation period would not allow recoupment of all costs within a reasonable period of time in the normal course of trade.

At this time, the Court will not speculate on whether Commerce can demonstrate from the data collected that production costs will not decline below the investigatory sales prices within a reasonable period of time in the normal course of trade. This is the issue the Court remanded to Commerce that the Court now finds was not adequately addressed on remand. The Court believes, however, that the capacity at which Toho was operating when the data was collected is one among many relevant factors Commerce should consider when projecting production costs of future transactions.

In its remand results, Commerce also states that inaccuracies existed in Toho's questionnaire responses which were discovered and corrected during verification. These corrections made the verified costs of production higher than initially claimed by Toho. The Court finds this point irrelevant to the issue on remand of whether Commerce's determination that sales by Toho at the prices charged during the investigatory period will not allow recovery of all costs within a reasonable period of time in the normal course of trade is supported by substantial evidence on the record.

A final point raised by Commerce on remand concerns its conclusion that Toho "presented no verifiable evidence of future profitability." *Id.* at 4. Commerce says the financial projections Toho offered were too late to be verified and thus it relied upon the best information available as directed by 19 U.S.C. § 1677e (1982 & Supp. III 1985).

The Court recognizes that Commerce is authorized to use the best information available when it is unable to verify information pro-

vided or the information is not produced in a timely manner. Commerce's reliance on the best information available, however, does not relieve the Court of its task of deciding whether the information relied on as the best evidence provides substantial evidence on the record in support of Commerce's determination. *See Atlantic Sugar, Ltd.* v. *United States,* 744 F.2d 1556, 1561 (Fed. Cir. 1984). Again the question on remand is not whether the record supports the conclusion that Toho would be able to recover its costs at the investigatory sales prices within a reasonable period of time in the normal course of trade, but whether Commerce's determination that Toho could not recover its costs in such time period is supported by substantial evidence on the record.

After reviewing the remand results and the briefs of the parties regarding such results, the Court is unable to conclude whether or not substantial evidence exists on the record to support Commerce's determination regarding this question. Because the Court finds Commerce did not adequately respond to the question posed by the remand, perhaps because Commerce misunderstood the purpose of the remand, the Court again remands the action to Commerce for an explanation as to why Toho will not be able to recoup its costs from sales at the investigatory prices within a reasonable period of time in the normal course of trade.

The Court expects Commerce in its explanation to specify what evidence on the record supports its determination. Commerce may continue to rely on data for a six-month period or, if it finds it necessary, may collect additional data. If Commerce finds that it cannot provide substantial evidence to support its determination, it shall use sales in the home market Japan to calculate foreign market value.

Commerce shall file with the Court within 30 days its new remand results. Plaintiff shall file any comments on these results within 15 days after the results are filed, and defendants and intervenors shall respond within 10 days after the filing of plaintiff's comments.

SO ORDERED.

ABSTRACTED CLASSIFICATION

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	
				Item No. and rate	Item
C87/144	Restani, J. September 11, 1987	Detroit Zoological Society	85-2-00275	Item 690.05 Various rates	Item 67 4.2%
C87/145	DiCarlo, J. September 14, 1987	Pharmacia Inc.	84-3-00334, etc.	Item 406.42, 407.16, 410.34, 425.52, 428.40, 430.00, 430.20, 432.25, and 493.68. Various rates	Item 79 5%,
C87/146	Aquilino, J. September 15, 1987	Sangamo Capacitor Division	85-6-00804	Classified as electrical capacitors fixed or variable at 10%	Item A A656 duty
C87/147	Restani, J. September 22, 1987	BBC Brown Boveri Corp.	85-7-00926	Item 661.06 5.6% or 5.9%	Item 66 3.8%
C87/148	Restani, J. September 22, 1987	BBC Brown Boveri, Inc.	85-9-01310	Item 661.06 5.6% or 5.3%	Item 66 3.8%
C87/149	Restani, J. September 22, 1987	Brown Boveri Corp.	84-2-00161	Item 661.06 5.9%	Item 66 4%
C87/150	Restani, J. September 22, 1987	Brown Boveri Corp.	85-3-00440	Item 661.06 5.9%	Item 66 4%
C87/151	Restani, J. September 22, 1987	Brown Boveri Corp.	85-3-00388	Item 661.06 5.9%	Item 66 4%

N DECISIONS

HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
No. and rate		
78.50 % or 4.4%	Agreed statement of facts	Michigan Rebuilding tenders, 30" gauge passenger coaches, etc.
99.99 4.8%, or 4.4%	Agreed statement of facts	New York Separation media used in chromatography, electrophoresis, and centrifugation
A516.94 6.15 Free of	Sangamo Capacitor Division v. U.S., 779 F.2d 30 (1985)	Greenville-Spartanburg S.C. Silver mica plates.
61.10 % or 4%	Agreed statement of facts	New York Turbochargers and/or parts thereof
61.10 % or 3.7%	Agreed statement of facts	New York Turbochargers and/or parts thereof
61.10	Agreed statement of facts	New York Turbochargers and/or parts thereof
61.10	Agreed statement of facts	New York Turbochargers and/or parts thereof
61.10	Agreed statement of facts	New York Turbochargers and/or parts thereof

C87/152	Restani, J. September 22, 1987	Brown Boveri Corp.	85-9-01309	Item 661.06 5.6% or 5.9%
C87/153	Aquilino, J. September 22, 1987	BBC Brown Boveri, Inc.	85-10-01363	Item 661.06 5.6% or 5.3%
C87/154	Aquilino, J. September 22, 1987	BBC Brown Boveri, Inc.	85-10-01364	Item 661.06 5.6% or 5.3%
C87/155	Aquilino, J. September 22, 1987	BBC Brown Boveri, Inc.	85-12-01763	Item 661.06 5.6% or 5.3%
C87/156	Aquilino, J. September 22, 1987	BBC Brown Boveri, Inc.	86-4-00477	Item 661.06 5.6% or 5.3%
C87/157	Aquilino, J. September 22, 1987	BBC Brown Boveri, Inc.	86-12-01539	Item 661.06 5.6% or 5.3%
C87/158	Aquilino, J. September 22, 1987	BBC Brown Boveri, Inc.	87-2-00295	Item 661.06 5.6% or 5.3%
C87/159	Aquilino, J. September 22, 1987	Canadian Corporate Management Co.	85-2-00256, etc.	Item 735.20 5.9% or 5.2%
C87/160	Restani, J. September 24, 1987	Algoma Tube Corp.	85-9-01167	Item 610.42 or 610.43 7.5% or 11%
C87/161	Restani, J. September 24, 1987	BBC Brown Boveri Corp.	85-9-01308	Item 661.06 5.6% or 5.3%
C87/162	Restani, J. September 24, 1987	Brown Boveri, Inc.	84-10-01391	Item 661.06 5.9%
C87/163	Restani, J. September 24, 1987	Brown Boveri Corp.	85-3-00382	Item 661.06 5.9%

Item 661.10 3.8% or 4%	Agreed statement of facts	New York Turbochargers and/or parts thereof
Item 661.10 3.8% or 3.7%	Agreed statement of facts	New York Turbochargers and/or parts thereof
Item 661.10 3.8% or 3.7%	Agreed statement of facts	New York Turbochargers and/or parts thereof
Item 661.10 3.8% or 3.7%	Agreed statement of facts	New York Turbochargers and/or parts thereof
Item 661.10 3.8% or 3.7%	Agreed statement of facts	New York Turbochargers and/or parts thereof
Item 661.10 3.8% or 3.7%	Agreed statement of facts	New York Turbochargers and/or parts thereof
Item 661.10 3.8% or 3.7%	Agreed statement of facts	New York Turbochargers and/or parts thereof
Item 270.25 Free of duty	Agreed statement of facts	Buffalo Puzzle and activity books
Item 610.39 or 610.40 0.1¢ per lb. + 4% + additional duties on the alloy content	Algoma Tube Corp. v. U.S., S.O. 85–89	Saulte St. Marie Quenched and tempered seamless alloy and non-alloy steel plain-end oilwell casings
Item 661.10 3.8% or 3.7%	Agreed statement of facts	New York Turbochargers and/or parts thereof
Item 661.10 4%	Agreed statement of facts	New York Turbochargers and/or parts thereof
Item 661.10 4%	Agreed statement of facts	New York Turbochargers and/or parts thereof

ABSTRACTED CLASSIFICATION D

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED
				Item No. and rate
C87/164	Aquilino, J. September 24, 1987	BBC Brown Boveri, Inc.	86-6-00748	Item 661.06 5.6% or 5.3%
C87/165	Aquilino, J. September 24, 1987	Ozen Sound Devices, Inc.	85-3-00367	Item 737.95 12.3% or 10.9%
C87/166	Aquilino, J. September 25, 1987	A.N. Deringer, Inc.	85-9-01297	Item 706.62 20%
C87/167	Aquilino, J. September 25, 1987	Applied Motion Products, Inc.	82-12-01792	Item 682.25 11% or 10.3%
C87/168	Aquilino, J. September 25, 1987	Applied Motion Products, Inc.	84-3-00356	Item 682.25 11%, 10.3% or 9.6%
C87/169	Aquilino, J. September 25, 1987	Peer Chemical Corp.	85-3-00379	Item 410.32 27.1% or 25.7%
C87/170	Carman, J. September 28, 1987	RBW Inc.	82-8-01222	Item 735.20 9%, 8.4%, 7.9% or 5.9%
C87/171	Aquilino, J. September 29, 1987	BBC Brown Boveri, Inc.	85-10-01365	Item 661.06 5.6% or 5.3%
C87/172	Aquilino, J. September 29, 1987	Brown Boveri Corp.	85-10-01362	Item 661.06 5.6% or 5.9%
C87/173	Tsoucalas, J. September 29, 1987	CR Industries	85-5-00656	Not stated

DECISIONS —Continued

HELD Item No. and rate	BASIS	PORT OF ENTRY AND MERCHANDISE
Item 661.10 3.8% or 3.7%	Agreed statement of facts	New York Turbochargers and/or parts thereof
Item 685.36 4.7%	Agreed statement of facts	New York Talking mechanisms
Item 772.15 6% or 5.3%	Agreed statement of facts	Boston "Small Pals Home"
Item 682.30 5.6% or 5.3%	Agreed statement of facts	San Francisco Electrical motors
Item 682.30 5.6%, 5.3% or 5.1%	Agreed statement of facts	San Francisco Electrical motors
Item 410.34 17% or 16%	Agreed statement of facts	Chicago Phthalocyanin Blue 8530
Item 270.25 Free of duty	C.J. Tower & Sons of Buffalo, Inc. v. U.S., 632 F. Supp. 13, *aff'd*, No. 86-1033 (Fed. Cir. 1986)	Buffalo Puzzle and activity books
Item 661.10 3.8% or 3.7%	Agreed statement of facts	New York Turbochargers and/or parts thereof
Item 661.10 3.8% or 4%	Agreed statement of facts	New York Turbochargers and/or parts thereof
Item 680.90 or 681.39 Various rates	Agreed statement of facts	Blaine Speedi-Sleeves

C87/174	Re, C.J. September 30, 1987	Belwith International, Inc.	78-11-02014	Item 546.54 Various rates	Ite[illegible]

tem 548.05 Various rates	Agreed statement of facts	Los Angeles Glass balls

ABSTRACTED VALUATIO

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	
V87/289	Watson, J. September 10, 1987	Bert Freidberg	R62/4854, etc.	Export value	Ap 7
V87/290	Watson, J. September 10, 1987	Kaysons Int'l Ltd.	R69/01058	Export value	Ap 7
V87/291	Watson, J. September 10, 1987	Puma USA, Inc.	86-1-00142	American selling price	$8.4 o p
V87/292	Watson, J. September 10, 1987	Puma USA, Inc.	86-1-00144	Export value or American selling price	$4.5 p le
V87/293	Watson, J. September 11, 1987	J. C. Penney	R61/9239, etc.	Export value	App 7.
V87/294	Watson, J. September 11, 1987	Realtone Electronics Corp.	R66/22687, etc.	Export value	App 7.
V87/295	Watson, J. September 11, 1987	Star-Lite Merchandise Corp.	R63/6118	Export value	F.o. di pr
V87/296	Watson, J. September 14, 1987	A & A Trading Corp.	R58/4156, etc.	Export value	App er at co

ION DECISIONS

HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
ppraised unit values less 7.5% thereof, net packed	Agreed statement of facts	San Francisco Binoculars, etc.
ppraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Seattle China & Porcelain ware
.40 per pair less 2% packed or $16.80 per pair less 2% packed	Agreed statement of facts	Seattle Footwear
.57 per pair net pkd or $4.72 per pair or $15.60 per pair less 2% pkd.	Agreed statement of facts	Seattle Footwear
ppraised unit values less 7.5% thereof, net pkd.	Agreed statement of facts	Norfolk Tubing mats
ppraised unit values less 7.5% thereof, net pkd.	Agreed statement of facts	New York Transistor radios, etc.
o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Transistor radios, etc.
ppraised values shown on entry papers less amounts attributable to buying commission	Agreed statement of facts	New York Electrical articles

V87/297	Watson, J. September 14, 1987	A & A Trading Corp.	R59/10625, etc.	Export value	F.o.l di pr or App en at co
V87/298	Watson, J. September 14, 1987	A & A Trading Corp.	R61/8674, etc.	Export value	F.o.l di pr or App en at co
V87/299	Watson, J. September 14, 1987	A & A Trading Corp.	R61/19498, etc.	Export value	App en at co
V87/300	Watson, J. September 14, 1987	Bayer Pretzfelder & Mills, Inc.	R60/21300, etc.	Export value	F.o.l di pr
V87/301	Watson, J. September 14, 1987	B.P.M. Int'l, Ltd.	R61/19253, etc.	Export value	F.o.l 20 f.c ap
V87/302	Watson, J. September 15, 1987	Durlacher & Co.	R62/2435, etc.	Export value	App 7.
V87/303	Watson, J. September 15, 1987	Randa, Inc.	R61/8256	Export value	F.o.l 20 f.c ap
V87/304	Watson, J. September 15, 1987	Randa, Inc.	R65/19346, etc.	Export value	F.o.l 20 f.c ap

.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values or praised values shown on entry papers less amounts attributable to the buying commission	A & A Trading Corp. v. U.S. C.D. 4472	Boston Transistor radios, etc.
.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values, or praised values shown on entry papers less amounts attributable to buying commission	A & A Trading Corp. v. U.S. C.D. 4472	Boston Transistor radios, etc.
praised values shown on entry papers less amounts attributable to buying commission	A & A Trading Corp. v. U.S. C.D. 4472	New York Electrical articles
.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	A & A Trading Corp. v. U.S., C.D. 4472	New York Transistor radios, etc
.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	A & A Trading Corp. v. U.S., C.D. 4472	New York 9 volt batteries
praised unit values less 7.5% thereof, net pkd.	Agreed statement of facts	New York Scarves
.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Los Angeles Flatware
.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Los Angeles Flatware

ABSTRACTED VALUATION DECIS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	I
V87/305	Watson, J. September 15, 1987	Winter Wolff & Co.	R59/1889, etc.	Export value	F.o.b. un 20% o f.o.b. u apprai
V87/306	Watson, J. September 22, 1987	Suncoast Merchandise Corp.	R62/8677, etc.	Export value	F.o.b. un 20% di f.o.b. u apprai
V87/307	Watson, J. September 22, 1987	W.J. Byrnes & Co.	R60/16571	Export value	F.o.b. un 20% o f.o.b. u apprai
V87/308	Watson, J. September 24, 1987	Texas Instruments, Inc.	82-5-00765	Constructed value	Value is summo
V87/309	Watson, J. September 24, 1987	Texas Instruments Inc.	82-5-00767	Constructed value	Net valu summo
V87/310	Watson, J. September 24, 1987	Texas Instrument Inc.	82-6-00864	Constructed value	Value is summo
V87/311	Watson, J. September 28, 1987	Texas Instruments Inc.	82-6-00848	Constructed value	Net valu summo
V87/312	Watson, J. September 29, 1987	F. B. Vandegrift	R60/16133, etc.	Export value	F.o.b. un 20% o f.o.b. u apprai
V87/313	Watson, J. September 29, 1987	Kowa American Corp.	R63/1451, etc.	Export value	F.o.b. un differe prices
V87/314	Watson, J. September 29, 1987	Nichimen Co.	R63/5284, etc.	Export value	Appraise 7.5% t

SIONS — Continued

HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
nit invoice prices plus of difference between unit prices and aised values	Agreed statement of facts	Los Angeles Pipe fitting
nit invoice prices plus difference between unit invoice prices and aised values	Agreed statement of facts	Los Angeles Transistor radios, etc.
nit invoice prices plus of difference between unit invoice prices and aised values	Agreed statement of facts	Seattle Binoculars
s net value claimed on ponses	Agreed statement of facts	Dallas Semiconductor devices
ue claimed on the sons	Agreed statement of facts	Dallas Semiconductor devices
s net value claimed on ponses	Agreed statement of facts	Dallas Semiconductor devices
ue claimed on the ponses	Agreed statement of facts	Dallas Semiconductor devices
nit invoice prices plus of difference between unit invoice prices and aised values	Agreed statement of facts	Philadelphia Rugs
nit prices plus 20% of ence between f.o.b. unit s and appraised values	Agreed statement of facts	New York San Francisco Transistor radios, etc.
ed unit values less thereof, net pkd.	Agreed statement of facts	Los Angeles Transistor radios, etc.

V87/315	Aquilino J. September 29, 1987	Pagoda Trading Co.	82-4-00562	American selling price
V87/316	Restani, J. September 30, 1987	Pagoda Trading Co.	83-4-00595	

$10.50 per pair less 2% pkd. or $7.50 per pair less 2%	Agreed statement of facts	Norfolk Footwear
Dutiable as entered	Agreed statement of facts	Los Angeles Women's nylon boots

Appeals to the U.S. Court of Appeals for the Federal Circuit

Fundicao Tupy S.A. *v.* United States, 11 CIT ——, Slip Op. 87–93, *appeal docketed,* No. 87–1570 (Fed. Cir. August 26, 1987).

Omni U.S.A. Inc. *v.* United States, 11 CIT ——, Slip Op. 87–77, *appeal docketed,* No. 87–1602 (Fed. Cir. Sept. 10, 1987).

Bonanza Trucking Corp. *v.* United States, 11 CIT ——, Slip Op. 87–79, *appeal docketed,* No. 87–1613 (Fed. Cir. Sept. 15, 1987).

Elbe Products Corp. *v.* United States, 11 CIT ——, Slip Op. 87–84, *appeal docketed,* No. 87–1619 (Fed. Cir. Sept. 21, 1987).

Jimlar Corp. *v.* United States, 11 CIT ——, Slip Op. 87–81, *appeal docketed,* No. 87–1628 (Fed. Cir. Sept. 22, 1987).

Decision of the U.S. Court of Appeals for the Federal Circuit

Ameritrade Corp. *v.* Carnes, 10 CIT ——, Slip Op. 86–53, *aff'd,* No. 87–1014 (Fed. Cir. Oct. 1, 1987).

Index

Customs Bulletin and Decisions
Vol. 21, No. 44, November 4, 1987

U.S. Customs Service

Treasury Decisions

General Notice

Proposed Rulemaking

U.S. Court of Appeals for the Federal Circuit

U.S. Court of International Trade

Slip Opinions

Abstracted Decisions

CAFC-Related Decisions/Appeals

*U.S. G.P.O. 1987-201-627:40061